Supreme Court, U.S.
FILED
JAN 6 - 2004
OFFICE OF THE CLERK

No. 03-971

IN THE
SUPREME COURT OF THE UNITED STATES

Isidoro Rodriguez, Esq.,

Petitioner,

v.

HFP INC.; IOTA Partners; Jack Harbeston; Edris E. Harbeston; Jerome Barron; Sea Search Armada; Armada Company; Danilo Davis Pereira; John Does 1-20; Murdock & Company; Dave LaRocue; Don Middlebrook; Ed Carpenter; and John Does Entities 1-6,

Respondents.

On Petition For Writ of Certiorari
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Isidoro Rodriguez, Esq.
THE LAW OFFICES OF
RODRIGUEZ & SIBLEY L.L.P.
2304 Farrington Avenue
Alexandria, Virginia 22303-1520
(703)960-0225
E-Mail: isidoror@EarthLink.net

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Federal Courts have limited personal and subject matter jurisdiction. They can only hear cases that fall both within the scope defined by the United States Constitution in Article III Section 2, and Congressional statutes. In this diversity action under 28 U.S.C. § 1332, the unpublished opinions of the Court of Appeals for the Fourth Circuit and District Court for the Eastern District of Virginia's ignore the mandate of 28 U.S.C. § 1738 and § 2072(b), as well as the *Erie* doctrine, therefore raising three substantial federal questions that warrant immediate review by this Court:

I. Whether the lower federal courts acted outside of their limited jurisdiction by issuing unpublished opinions that were in noncompliance with the mandate of 28 U.S.C. § 1738, by ignoring VA Code § 54.1-3932 and controlling case law regarding the enforcement of Petitioner's Virginia statutory Attorney's Lien and the protection against a business conspiracy pursuant to Va Code § 18.2-500?

II. Whether the lower federal courts acted outside their limited jurisdiction in violation of the 28 U.S.C. § 2072(b), by their repeated use of unpublished decisions depriving Petitioner of his substantive property right in his Virginia Attorney's Lien, and damages for a business conspiracy?

III. Whether the lower federal courts acted outside their limited jurisdiction by repeatedly using unpublished decisions to deny Petitioner of his right to due process and equal protection of the laws of Virginia?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Isidoro Rodriguez, Esq. (" Rodriguez"), prays that a writ of certiorari be issued to review the unpublished judgment and opinion of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"), entered in this proceeding on October 10, 2003.

CITATIONS TO UNPUBLISHED OPINIONS BELOW

The unpublished opinion of the Fourth Circuit, No. 03-1084, October 10, 2003, is reprinted at A-1;[1] The unpublished transcript of hearing and opinion of Hon. Judge Gerald Bruce Lee, U.S. District Court of the E. D. of Virginia, No. 02-1523-A, dated December 13, 2002, is reprinted at A-3.

The unpublished order of the Fourth Circuit, denying a Petition for Rehearing En Banc, No. 01-1884, January 18, 2002, is reprinted at A-24. The unpublished opinion of the Fourth Circuit No. 01-1884, November 28, 2001, is reprinted at A-25. The unpublished opinion of the Fourth Circuit No. 01-1774, July 26, 2001, denying a Petition for Writ of Mandamus to the Hon. Judge Gerald Bruce Lee, U.S. District Court of the E. D. of Virginia is reprinted at A-27. The unpublished orders of the Fourth Circuit No. 01-1671, June 12, 2001, and July 24, 2001, denying a Petition for Writ of Mandamus to the Hon. Judge James C. Cachceris, U. S. District Court of the E. D. of Virginia are reprinted respectively at A-29. The unpublished orders of the Fourth Circuit No. 01-1129, dated June 19, 2001, and May 14, 2001, dismissing an Interlocutory Appeal of the December 20, 2000 order, are reprinted at A-30. The unpublished Order

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[1] "A-" references are to pages in the separate bound Appendix.

and Memorandum of the Hon. Judge Gerald Bruce Lee, U. S. District Court for the E. D. of Virginia, No. 00CV1523-A, June 5, 2001, dismissing the Complaint as to Defendant Danilo Davis Pereira, is reprinted at A-31. The unpublished Report and Recommendation of the Hon. Magistrate Judge Theresa Carroll Buchanan of the U. S. District Court for the E. D. of Virginia, No. 00CV1523-A, April 25, 2001, is reprinted at A-40. The unpublished bench opinion and order of the Hon. Judge James C. Cachceris of the U. S. District Court for the E. D. of Virginia, No. 00CV1523-A, December 20 and 21, 2000, dismissing the Complaint as to Defendants Jack Harbeston, Sea Search Armada, Armada Company, and IOTA Partners, are reprinted at A-46.

The Virginia Bar Legal Ethics Opinion #1325, February 27, 1990, confirming Rodriguez's right to enforce his Virginia Attorney's Lien is reprinted at A-58.

STATEMENT OF JURISDICTION

The unpublished opinion of the Fourth Circuit was entered on October 10, 2003 (A-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and § 2072.

U.S. AND VIRGINIA CONSTITUTION, FEDERAL AND VIRGINIA STATUTORY PROVISIONS INVOLVED
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STATEMENT OF THE CASE

This action was filed on October 15, 2002, in the United States District Court for the Eastern District of Virginia, Alexandria based on diversity of citizenship pursuant to 28 U.S.C. § 1332, § 1738, § 2072, and Virginia's Long Arm Statute, VA Code § 8.01-328.1(A)(1),(3), and (4). The action sought to enforce Rodriguez's Virginia Attorney's Lien under VA Code §54.1-3932 and controlling decisions of the Virginia Supreme Court, based on the fraudulent dissolution of Sea Search-Armada and Armada Company in mid-2002, pursuant to VA Code § 18.2-499 and 500, and to protect Rodriguez's business and profession from a business conspiracy.

i. SSA Entities purposefully availed themselves of the protections of the laws of Virginia.

On June 2, 1988, former Congressman and subsequently the chief lobbyist and negotiator for SSA Entities (Addendum "a"),[2] Mr. Guy Vander Jagt, Esq., lobbied

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[2]SSA Entities are the finder claimants to 25 sunken treasure troves targets valued at $3 to $10 Billion, off of the coast of the Colombia, including the 1707 Spanish Galleon *San Jose ("Treasure Trove"), (MAXIM,*

the U.S. Congress against the "Colombian expropriation of vested right of the Sea Search-Armada."

So to protect SSA Entities contract rights, shortly thereafter in September 1988, on behalf of Sea Search-Armada, and before the formation of IOTA Partners, Harbeston in Idaho, entered into both verbal and written contracts with Rodriguez for him to serve as the Legal Representative of Sea Search-Armada in Colombia, specifically because he was a Virginia Attorney. Based on Rodriguez assured fidelity as a Virginia attorney the Board of Directors on December 15, 1988, delegated all of their corporate powers and authority to Rodriguez as their "Lawyer and agent in Colombia."[3]

On behalf of SSA Entities, Rodriguez on January 8, 1989, filed an against Colombia that has been described by Congressmen Benjamin A. Gilman, Dan Burton, and Phil M.

Colombian Gold, July 2003). Defendant IOTA Partners LP, is an Idaho limited partnership organized by Jack Harbeston ("Harbeston") on October 22, 1988, for the sole purpose of the "salvage of treasure trove in or about Colombia," which is owned by Sea Search-Armada and Armada Company (Addendum "a"). Defendant HFP, Inc., is owned by Harbeston and incorporated in the State of Washington, to serve as the General Partner of IOTA Partners LP. Thus these entities are either owned or controlled by Harbeston, and with their alter ego and shell corporations comprise.

3 Under Colombian law a "Legal Representative" is a term designating an individual given wide fiduciary corporate authority directly from the Board of Directors of an entity. This was critical for SSA Entities to obtain jurisdiction to sue Colombia on its contract claim, thus it delegated the full power of the Board of Director's of Sea Search-Armada and Armada Company to Rodriguez in Colombia, including the power to settle their claims.

Crane, as the "largest private claim by American citizens against a foreign state pending in the world."

Due to the nonpayment of numerous invoices by SSA Entities, Rodriguez obtained on February 27, 1990, a VA Legal Ethics Opinion #1325,[4] to enforce his Virginia statutory Attorney's Lien against SSA Entities, which stated,

> . . . [Rodriguez being] admitted to practice in Virginia is subject to the Virginia Code of Professional Responsibility although engaged in practice elsewhere . . . when [he] assumes the responsibility of acting as a fiduciary . . . As such Rodriguez's suit for Attorney fees is permissible. (A-58)

After 1993, in compliance with his fiduciary duty to SSA Entities, Rodriguez was required to reside in the dangerous country of Colombia. In 1998, after SSA Entities prevailed in the Court of Appeals in Colombia, the Colombian Government made an offer to settle, and Rodriguez as Legal Representative submitted SSA Entities's counteroffer, which Mr. Guy Vander Jagt as chief lobbyist to Congress, negotiated on behalf of SSA Entities.

After Congress passed "Plan Colombia" in 1999, involving the transfer to Colombia of over $2 Billion, including $300 million dollars of "soft money," on April 6, 2000, without any apparent authorization of the Board of Directors, Harbeston sent a letter from the State of Wash-

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[4] Consistent with Virginia Bar Ethics Opinions and VA Code § 54.1.3932, Rodriguez has an Attorney's Lien of $4.5 million based on *quantum merit*, for his more than twelve years of *pro hoc vice* fiduciary and legal management services as Legal Representative and managing attorney for Sea Search-Armada and Armada Company.

ington to Rodriguez at his office in Alexandria, Virginia, unilaterally terminating Rodriguez and stated that, "neither Sea Search-Armada nor its related entities and individuals owe [Rodriguez] anything for past, present, or future fees."

Subsequently, while still having an outstanding claim to the *Treasure Trove*, in April and June of 2002, Sea Search-Armada and Armada Company conspired to dissolve and transfer their interest to SSA Entities, and thereby damage Rodriguez's business and profession by fraudulently avoiding Rodriguez's Virginia statutory Attorney's Lien and rights as a statutory creditor. *See Isidoro Rodriguez, Esq. v. Guy Vander Jagt, et al.*, Fairfax County Circuit Court, Law No. 215327 (Wooldrige, J.).[5]

ii. Proceedings in lower federal courts

Upon giving notice, Rodriguez filed on September 12, 2000, a declaratory judgment action based on Virginia Supreme Court precedent and VA Code § 54.1-3932, in the United States District Court for the Eastern District of Virginia, *Rodriguez v. Harbeston et al.*, No. 00CV1523 (Cachceris, J). In unpublished decisions (A-24, A-25, A-27, A-29, A-30, A-31, A-40, and 46), the Fourth Circuit and the District Court refused to provide any meaningful hearing or even refer to VA Code § 54.1-3932, which was the grava-

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[5] After the unpublished order of the Fourth Circuit was issued on October 10, 2003, an Amended Motion for Judgment ("AMFJ") was filed November 14, 2003, in the Fairfax County Circuit Court against SSA Entities, their chief lobbyist and negotiator Mr. Guy Vander Jagt, their attorney Mr. Harrison Ledger, and John Does, to enforce Rodriguez's Virginia Attorney's Lien, and to protect Rodriguez business and profession for a business conspiracy based on his his rights as a statutory creditor and the fraudulent dissolution of Sea Search-Armada and Armada Company.

men of the complaint. Instead the federal courts solely based their unpublished opinions on contract law, intentionally disregarding the mandate of both the 28 U.S.C. § 1738 and §2072, so to not follow the controlling precedents and law of Virginia as to Rodriguez substantive property rights in his Virginia statutory Attorney's Lien.[6]

On October 15, 2002, Rodriguez filed the instant action to specifically enforce and protect his Virginia statutory property right, including from a malicious business conspiracy, *Rodriguez v. HFP, Inc., et al.* U.S. Dist. Ct. E.D. Va. 02CV1523 (Lee, J). On December 13, 2002, Judge Lee in an unpublished opinion disregarded Rodriguez's Virginia statutory rights pursuant to VA Code § 54.1-3932 and VA Code § 18.2-500 (based only on the earlier unpublished order of Judge Cachceris), and refused to certify the question of Virginia law to the Supreme Court of Virginia as being "advisory" in violation of Article III of the Constitution (A-5 and A-22). On October 10, 2003, the Fourth Circuit, No. 03-1084, affirmed in an unpublished opinion (A-1).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Court's review of the Fourth Circuit's unpublished decisions is warranted because the Fourth Circuit, (i) "has decided an important federal question in a

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[6]Because the surreal nature of the unpublished decisions provided a *prima facie* case of political skulduggery, Rodriguez filed a Judicial Complaint under 28 U.S.C. § 372, CA4C No. 02-9008, against the various federal judges for acting outside of their jurisdiction (Judicial immunity is limited when judges act in the "clear absence of all jurisdiction" *Stump v. Sparkman*, 435 U.S. 349 at 357 (1978)). This administrative complaint was denied without comment in 2002.

way that conflicts with a decision by a state court of last resort;" and, (ii) "has so far departed from the accepted and usual course of proceedings, and sanctioned such a departure by a lower federal court, as to call for an exercise of this Court's supervisory power" Sup. Ct. R. 10 (a).[7]

I BY USING UNPUBLISHED OPINIONS TO NOT COMPLY WITH THE MANDATE OF 28 U.S.C. § 1738, THE FOURTH CIRCUIT AND DISTRICT COURT HAVE REPEATEDLY ACTED OUTSIDE OF THEIR LIMITED JURISDICTION.

Regarding the enforcement and protection of a VA Attorney's Lien, the Supreme Court of Virginia has held that the language of VA Code § 54.1-3932, is " . . . **broad and permits no interpretation limiting the benefits of the statute to Virginia lawyers. . . .**"(Emphasis added). *Hughes v. Cole,* 251 Va. 3 at 27, 465 S.E.2d 820 (1996).

> The law is clear that `when . . . an attorney employed under a contingent fee contract is discharged without just cause . . . the discharged attorney is entitled to a fee based upon *quantum merit* for services rendered prior to discharge and, as security for such fees, to the lien granted by [VA Code § 54.1-3932].'(citation omitted). *Hughes v. Cole* 251 Va. at 23.

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The insidious danger and abuses of the use of unpublished decisions as the Fourth Circuit and District Court have done is re-enforced by the criteria used by this Court in granting Certiorari, S. Ct Rule 10. Thus arguably a federal courts abuse will not be reviewed given that an unpublished decision has no store decisis effect, thereby it will never reach any of the threshold consideration used for granting a Writ.

Based on the clear reading of Va. Code § 54.1-3932, as well as controlling case law and the VA Legal Ethics Opinions,[8] when Rodriguez as a Virginia attorney was discharged by SSA Entities prior to the completion of the representation he has an inviolate right to recover the reasonable value of his services that he rendered for twelve years to SSA Entities based on *quantum merit*. *See Virginia Lawyer Register*, March 2003, Vol 51/No. 8, p. 13 ¶17, the Official Publication of the Virginia State Bar; VA Legal Ethics Opinion No. 1606 and No. 1766; *See also,* VA. Code § 54.1-3932; and *Heinzman v. Fine, Fine, Legum & Fine*, 217Va. 958, 234 S.E.2d 282 (1977).

This inviolate right exist because Virginia has the undisputed interest in protecting Rodriguez's ability to be paid for *pro hoc vice* legal services rendered outside of Virginia–there is no contrary interest to suggest that Virginia's public policies should not control based on equal protection and the Art. IV, sec. 2 of the Constitution, the "privileges and immunities clause," *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985).[9] *See In the Matter of Istem, Inc., Res-*

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[8] VA Legal Ethics Opinion issued to Rodriguez (A-58), importantly stated that although "engaged in practice elsewhere" outside of Virginia, at all times Rodriguez's fidelity to his *pro hoc vice* fiduciary and legal duty as Legal Representative of SSA Entities was governed by the Virginia State Bar, the administrative agency of the Virginia Supreme Court, and to "prevent fraud or gross imposition" Rodriguez, has the right to sue for his fee. Thus under VA Code Ann. § 54.1-3910, it is "incorporated into the Code of Virginia," and has legal force and effect of the Va Code. *See also,* 15 VAC 5-40-360. Committee on Legal Ethics.

[9]Also any decision to not enforce Rodriguez's VA Attorney's Lien for his *pro hoc vice* fiduciary services would be an impermissible burden on interstate commerce, and an unlawful usurpation of the power granted

pondent v.. Chemical Bank Respondent, and Wilkie Farr Gallagher, Appellant, 78 N.Y.2d 342, 581 N.E.2d 1042, 575 N.Y.S.2d 796 (1991).

Therefore Rodriguez has established a *prima facie* basis of general personal jurisdiction, and any challenge to personal jurisdiction is barred by the *Rooker-Feldman* doctrine.[10] *See also, Allstate Insurance v. West Virginia State Bar*, 233 F.3d 81 (4th Cir. 2000).

For these reasons the Fourth Circuit and the District Court's unpublished opinions (A-1, A-3, A-24, A-25, A-27 A-29, A-30, A-31, A-40, and A-46), which intentionally neither addressed nor cited at all either controlling Virginia statute or case law anywhere in the combined 57 pages of the Appendix, violated 28 U.S.C.A. § 1738, by being based only on contract law analysis and not the statutory rights of Rodriguez.[11]

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only Congress to regulate Commerce pursuant to Art. I, Section 8, cl. 3, *See Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948).

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District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1983), establish the fact that lower federal courts do not have jurisdiction to conduct direct review of state court decisions . *Rooker* 263 U.S. at 416; *Feldman* 460 U.S. at 482.

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It is for this reason Judge Lee's hypothetical did not deal with either the facts or law at issue (A-18), since there is a great difference between a cause of action based on an "at-will employment" agreement, and an action to enforce a Virginia statutory Attorney's Lien. The former is based only on rights under common law contract theory, the latter is based on a public policy right given specifically by the Virginia legislature, which the Virginia Supreme Court has held "permits no interpretation limiting the benefits of the statute to a Virginia Attorney." Thus although Virginia strongly adheres to the common law employment-at-will doctrine, *see Lawrence Chrysler Plymouth Corp. v. Brooks*, 251 Va. 94, 97,

II. IN USING UNPUBLISHED DECISIONS THE FEDERAL COURT HAVE ACTED OUTSIDE THEIR LIMITED JURISDICTION IN VIOLATION OF 28 U.S.C. § 2072, TO DEPRIVE RODRIGUEZ OF HIS SUBSTANTIVE PROPERTY RIGHTS IN HIS VIRGINIA ATTORNEY'S LIEN

Here Rodriguez's Virginia statutory Attorney's Lien, VA Code § 54.1-3932, on the *Treasure Trove* claimed by SSA Entities, came into existence immediately upon making of the verbal and written contracts with SSA Entities. *Fary v. Aquino*, 218 Va. 889, 241 S.E. 2d 799 (1978); *Ruebush v. Funk*, 63 F.2d. 170 (4th Cir. 1933); *Tignor v. Parkison*, 729 F.2d. 977 (4th Cir. 1984). Also Rodriguez's Virginia Attorney's Lien VA Code § 54.1-3932, makes him a party in interest in the contract litigation against Colombia. *Katopodis V. Liberian S/T Olympic Sun*, 282 F.Supp. 369 (E.D. Va 1968); and his Virginia Attorney's Lien VA Code § 54.1-3932, remains inchoate until judgement or recovery is obtained. *Montavon v. United States*, 864 F.Supp. 519 (E.D. Va. 1994). Finally, since Rodriguez was discharged without just cause by SSA Entities, and he is entitled to a fee based on *quantum merit* for the twelve years of service rendered for the period of September 15, 1988 to April 6, 2000.

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465 S.E.2d 806, 808 (1996)(quoting *Miller v. SEAVAMP, Inc.*, 234 Va. 462, 465, 362 S.E.2d 915, 916-17 (1987)(citations omitted)), Virginia courts have held that the common law employment-at-will doctrine is not absolute, and has recognized as here a public policy exceptions to this doctrine, *see Bowman v. State Bank of Keysville*, 229 Va. 534, 540, 331 S.E.2d 797, 801 (1985). In the instant action Rodriguez identified specific Virginia statutes in which the General Assembly had established public policies that SSA Entities *et al.*, have contravened--the public policy to assure that a Virginia attorney is paid for his work. *Lawrence Chrysler Plymouth Corp. v. Brooks*, 251 Va. at 98-99, 465 S.E.2d at 809 (1997). *See also Bailey v. Scott-Gallaher, Inc.*, 253 Va. 121, 480 S.E.2d 502 (1997).

Heinzman v. Fine, Fine, Legum & Fine, 217Va. 958, 234 S.E.2d 282 (1977).

However, since 2000, in total disregard of the above cited Supreme Court of Virginia controlling precedent, as well as inconsistent with its own decisions, the Fourth Circuit and the District Court through the use of 10 unpublished decisions, has treated Rodriguez's Virginia statutory Attorney's Lien VA Code § 54.1-3932, under simple contract law, and thereby have unlawfully deprived Rodriguez of his substantive property rights in his Virginia Attorney's Lien, and Rodriguez's right to protect his business and profession from a business conspiracy.

It has been said that the primary justification for the use of unpublished decision is that an unpublished decision neither establishes a new rule of law, modifies existing rule of law, applies an existing rule to distinct fact, nor concerns any issue of significant public interest. 5th Cir. R. 47.5.1, *Williams v. Dallas Rapid Transit*, 256 F.3rd 260 at 261 (5th Cir. 2001)(see discussion of the dissent of Circuit Judge Smith, Jones, and DeMoss). However in the instant action not only do none of these justifications exist, but more importantly the Fourth Circuit and District Courts use of unpublished opinion failing to address in any manner Rodriguez's Virginia statutory rights, have effectively created the "Rodriguez exception" to Va Code § §54.1-3932 and VA Code § 18.2-499 and 500, and controlling precedent.

Relevant to this request for review by this Court of the use of unpublished opinions by the Fourth Circuit and the District Court to avoid following controlling precedent, are both the discussion of the dissent in *Williams v. Dallas Rapid Transit*, 256 F.3rd 260 (5th Cir. 2001), and *Anastasoff*

v. United State, 223 F.3d 898 (8th Cir. 2000). In *Anastasoff*, a panel of the U.S. Court of Appeals for the Eighth Circuit ruled that its own rule denying procedural effect to unpublished opinions was un-Constitutional. Although the *Anastasoff* ruling was later vacated as moot due to settlement of the underlying IRS claim (No. 99-3917EM, December 18, 2000), the decision is relevant in reviewing the unpublished decisions issued here, since according to *Anastasoff* 223 F.3d at 904, federal judges are bound to follow the law. To do otherwise, the Eight Circuit argued would invite judicial tyranny by freeing federal courts from the doctrine of precedent:

> A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles." *Id.* (quoting Joseph Story, Commentaries on the Constitution of the United States § 377 (1833)).

Consistent with this Constitutional principal, both 28 U.S.C. § 2072, and 28 U.S.C. § 1738, mandate that federal district courts, even in unpublished decisions, are bound to follow the substantive law of the state in which the court is sitting. The United States Supreme Court has held similarly. *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.E. 1188 (1938). As explained by Justice Felix Frankfurter in *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 LE 2079:

> The intent of the [*Erie*] decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of diversity of citizen-

ship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court. (Emphasis added)

Thus in accordance with 28 U.S.C. § 2072, 28 U.S.C. § 1738 *Erie*, neither the Fourth Circuit, nor Judge Lee, nor Judge Cachceris have the freedom to depart from, disregard, or modify existing Virginia decisional law and statute regarding the enforcement of Rodriguez's Va Attorney's Lien. *King v Order of United Commercial Travelers of America*, 333 U.S. 153, 68 S.Ct. 488, 92 L.E. 608 (1948). These Judges can neither seek to change what appears to be the present law, *Cantwell v. University of Massachusetts* 551 F.2d 879 (1st Cir. 1977), nor can these Judge "correct" a state court's interpretation of its own law, *Tarr .v. Manchester Insurance Corp.*, 544 F.2d 14 (1st Cir. 1976).

Put in the simplest terms 28 U.S.C. § 2072, 28 U.S.C. § 1738, and the *Erie* doctrine as developed requires the Fourth Circuit, Judge Lee and Judge Cachceris to apply Virginia's substantive laws in determining any issue or claim raised by Rodriguez which has its source under laws of Virginia–they cannot simply not address the argument in unpublished decisions on the false assumption that Rodriguez will not have the tenacity required to protect his Virginia statutory property rights. *Calder v. Jones* 465 U.S. 783 (1984); *Burger King v. Rudzewicz*, 471 U.S. 462 at 473 (1985); *Wein Air Alaska v. Brandt*, 195 F.3d 208 (5th Cir. 1999); *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1116 (6th Cir. 1994); *John R. Neal and Lea A. Neal v. Sjef Janseen*, 270 F3rd 328 (6th Cir. 2001); *Dollar Sav. Bank v. First Sec. Bank of Utah, N.A.*, 746 F.2d 208 (3d Cir 1984); *General Electric Company v. Deutz AG*, 270 F3d 144 (3rd Cir. 2001).

Similarly the repeated denial of motions to Certify the Question of Rodriguez's Virginia statutory rights to the Supreme Court of Virginia based on Judge Lee's unpublished opinion (A-5), that to seek Certification was only "advisory" in violation of Article III, was in error based on the clear wording of 28 U.S.C. § 2072, 28 U.S.C. § 1738, as well as the *Erie* doctrine. As the Seventh Circuit explained in *Allstate Insurance v. Menards, Inc*, 18 F.3d 1155 at 1161 (7th Cir. 2002), that to maintain the constitutional line between limited federal lawmaking power and state residual lawmaking power,

> *Erie* requires that the federal court follow an analytical path that ensures that the law applied in federal proceedings is the law that "ultimately would be applied were the case to be litigated in the state courts." *Roberts v. S. Life Ins. Co.*, 568 F. Supp. 536, 539-40 (N.D. Ill. 1983) (Emphasis added.

III. THE FEDERAL COURTS USE OF UNPUBLISHED OPINIONS HAVE UNLAWFULLY DEPRIVED RODRIGUEZ OF HIS SUBSTANTIVE PROPERTY RIGHTS AS A VIRGINIA ATTORNEY WITHOUT DUE PROCESS AND EQUAL PROTECTION UNDER THE LAWS OF VIRGINIA.

A review of all the proceedings and the unpublished orders of Fourth Circuit, Judge Lee and Judge Cachceris since December 2000, brings into focus that "[t]here is no crueler tyranny than that which is exercised under cover of law, and with the colors of justice ..." – *U.S. vs. Jannottie*, 673 F.2d 578, 614 (3d Cir. 1982).

The Fourth Circuit and the District Court cannot disregard both Rodriguez's Virginia statutory property right

in his Virginia Attorney's Lien, and right to protect his business and profession, as well as his fundamental rights as a citizens of the United States and the Commonwealth of Virginia to a fair and impartial hearing, without the ability of Rodriguez to challenge their actions, because it would give the federal courts unlimited power[12]–and this in itself is a violation of the Fifth Amendment to the U.S. Constitution.

Thus the different and discriminatory treatment given Rodriguez's Virginia statutory rights by the Fourth Circuit and District Court irrespective of the mandate of 28 U.S.C. § 2072, 28 U.S.C. § 1738, as well as the *Erie* doctrine, in total disregard of the controlling precedent of *Telco Communications v. An Apple a Day*, 977 F.Supp 404 at 407(E.D.Va. 1997), *Heinzman v. Fine, Fine, Legum & Fine*, 217Va. 958, 234 S.E.2d 282 (1977); *English & Smith v. Metzger*, 901 F.2d 36, 39 (4th Cir. 1990); *Katopodis v Liberian S/T Olympic Sun*, 282 F.Supp. 369 (E.D. Va. 1968), is a violation of Rodriguez's right to due process and equal protection of the laws under the Fifth Amendment. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 108 S.Ct. 2260 (1988); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 105 S.Ct. 1272 (1985).

a. Lack of Meaningful Hearing.

"The fundamental requirement of due process is the opportunity to be heard `at a meaningful time in a mean-

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12

It has been stated that, "[u]nlimited power is apt to corrupt the minds of those who possess it; and this I know, my lords, that where law ends, tyranny begins." Lord Chatham (William Pitt) to the British House of Lords in January 1770.

ingful manner.'" *Mathews v. Elridge*, 424 U.S. 319, at 333 (1967)(citation omitted).
Specifically, due process requires that Rodriguez: (1) be entitled to fact finding based on a record produced before the District Court, and not based on *ex parte* discussions or unpublished decisions; (2) be allowed to make and have addressed arguments regarding the applicability of his Virginia's Attorney's Lien and business conspiracy statue; and (3) have the right to an individualized determination on his claims under these statutes based on Supreme Court of Virginia precedent. *See Abdulai v. Ashcroft*, 239 F.3d 542 at 549 (3rd Cir. 2001).

Because none of the above requirements were met by the Fourth Circuit and the District Court unpublished opinions, Mr. Rodriguez's right to due process and equal protection under the law s of Virginia were violated.

For example, during oral argument on SSA Entities motion to dismiss on December 22, 2000, the Hon. Judge James C. Cachceris, specifically interrupted and prevented Mr. Rodriguez from discussing the two theories of the Complaint, i.e. enforcement and protection from tortious interference of his Virginia statutory Attorney's Lien, VA Code 54.1-3932–instead Judge Cachceris focus only on contract analysis (A-52). Also regarding the proceedings concerning Mr. Devis, neither the Report and Recommendation of Hon. Magistrate Judge Theresa Carroll Buhanan (A-40), nor the Final Order District Judge Gerald Bruce Lee (A-31), gave any consideration to either the counts in the Complaint or the record regarding the protection of Rodriguez's Attorney's Lien from tortious interference by his agent. In this context note that in Footnote 3 of Judge Lee's unpublished opinion of June 5, 2001 (A-38), although not

citing the either VA Code or case law, Judge Lee did find in dicta that the Virginia Bar Ethics Opinion did provide for an action against SSA Entities, but assumed away the cause of action based on tortious interference with said property interest.

b. Denial of right to Jury trial.

The Seventh Amendment to the United States Constitution and Section 11 of the Constitution of Virginia guarantees the right to a jury trial. Fed. R. Civ. P. Rule 38(a), states that the right of trial by jury as declared by the Seventh Amendment, or as given by a statute of the United States, is preserved to the parties "inviolate."

Where a preliminary challenge is made to a jurisdictional fact in an action and on an issue where trail by jury is a matter of right, the issue should not be adjudicated summarily but should be submitted for a jury determination. *Andreas v. Imperial Air Lines Inc.*, 211 F.Supp 311 (E.D. Pa. 1962).

As this Court held in *Ross v. Berhard* 396 U.S. 531, 90 S.Ct. 733 at 738 (1957), "there is a right to a jury trial on the legal claims which must not be infringed by trying the legal issues as incidental to the equitable ones or by a court trail of a common issue existing between the claims." Where determination of equitable issues arising out of the same transaction would be conclusive as to legal issues, the legal issues must be tried first. Prior non jury trial of the equitable issues could infringe the right to jury trial on the legal issues because of the *collateral estoppel* or *res judicata* effect of prior judicial determination of issues common to the two set of claims. *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948 (1959).

Therefor once the claim for money damages to enforce Rodriguez's Attorney's Lien and for the business conspiracy and tortious interference of said property rights were made, the District Court had the responsibility to analyze the nature of the claims and to try the legal claims before a jury first. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894 (1962).

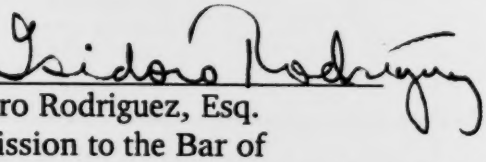
Thus when the District Court was in error to deny discovery and determine the jurisdiction on the Complaint, other pleadings and the affidavits without a jury. Because although the District Court may gather evidence on the question of personal jurisdiction by affidavit or otherwise, and based upon the evidence so obtained decide the jurisdictional dispute before trial, where the issue of jurisdiction is dependant upon a decision on the merits, the trial court should postpone determine of personal jurisdiction by proceeding to a decision on the merits before a jury, the purpose of such postponement being prevention of a summary decision on the merits without the ordinary incidents of a trial, including the right to jury. *See Schramm v. Oakes*, 352 F.2d 143, 149 (10th Cir. 1965).

CONCLUSION

This Petition challenges the Fourth Circuit and the District Court's use of unpublished decisions to act outside of their limited jurisdiction and authority by refusing to comply with the judicial decisions and statutes of the Commonwealth of Virginia as mandated by 28 U.S.C. § 2072, 28 U.S.C. § 1738, as well as the *Erie* doctrine, by refusing to consider in any manner Rodriguez's substantive Virginia statutory property right in his Virginia Attorney's Lien, and in his right to protect his business and profession from n on going business conspiracy. Also the effective

result of the Fourth Circuit and District Court's unpublished decision is to establish the "Rodriguez Exception" to Virginia's Attorney's Lien and business conspiracy statutes, in violation of Rodriguez's right to due process and equal protection of the federal and state code and the Constitution, thus the petition for a writ of certiorari should be granted.

Respectfully submitted,

By: 

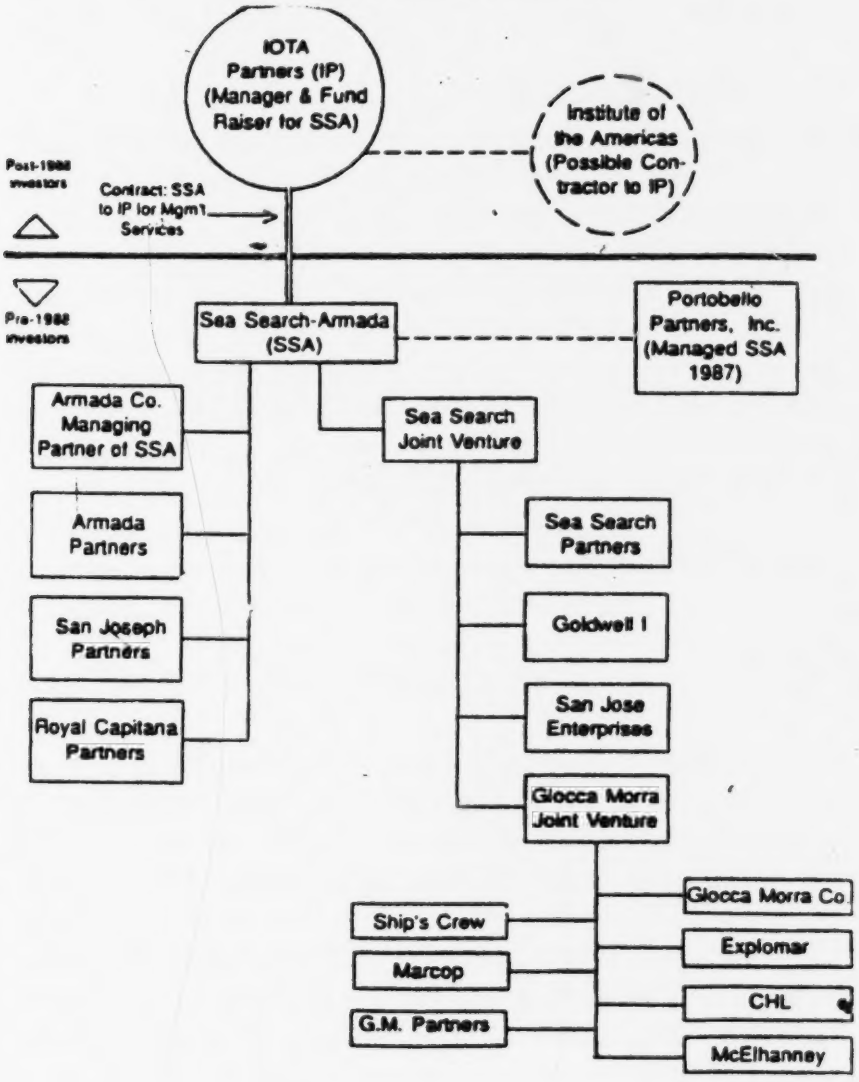
Isidoro Rodriguez, Esq.
Admission to the Bar of
The United States Supreme Court Bar 1992

LAW OFFICES OF RODRIGUEZ & SILBLEY L.L.P.
2304 Farrington Avenue
Alexandria, Virginia 22303-1520
E-Mail: isidoror@EarthLink.net
(703)960-0225

ADDENDUM

SSA ENTITIES VENTURE ORGANIZATION STRUCTURE

Summary of SSA Entities



(2)

Supreme Court, U.S.
FILED

03-971 JAN 6 - 2004

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Isidoro Rodriguez, Esq.,

Petitioner,

v.

HFP INC.; IOTA Partners; Jack Harbeston; Edris E. Harbeston; Jerome Barron; Sea Search Armada; Armada Company; Danilo Davis Pereira; John Does 1-20; Murdock & Company; Dave LaRocue; Don Middlebrook; Ed Carpenter; and John Does Entities 1-6,

Respondents.

On Petition For Writ of Certiorari
United States Court of Appeals for the Fourth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Isidoro Rodriguez, Esq.
THE LAW OFFICES OF
RODRIGUEZ & SIBLEY L.L.P.
2304 Farrington Avenue
Alexandria, Virginia 22303-1520
(703)960-0225
E-Mail: isidoror@EarthLink.net

Counsel for Petitioner

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-1084

Submitted: September 8, 2003Decided: October 10, 2003

ISIDORO RODRIGUEZ,

Plaintiff-Appellant,

versus

HFP INCORPORATED, General Partner; IOTA PARTNERS; EDRIS E. HARBESTON; JACK HARBESTON; JEROME BARON,

Defendants- Appellees,

and

ARMADA COMPANY, General Partner; SEA SEARCH ARMADA; DOE ENTITIES 1-6; MURDOCK & COMPANY; DAVE LAROCQUE; DON MIDDLEBROOK; ED CARPENTER; DANILO DEVIS PEREIRA; JOHN DOES, 1-10,

Defendants.

Appeal from the United Sates District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (CA-02-1523-A)

Before LUTTIG, MOTZ, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Isidoro Rodriguez, LAW OFFICES OF RODRIGUEZ & SIBLEY, Alexandria, Virginia, for Appellant. R. Harrison Pledger, Jr., PLEDGER & FEORD, P.L.C., McLean, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Isidoro Rodriguez appeals the district court order dismissing his complaint for lack of personal jurisdiction. We review de novo de district court's legal conclusions concerning personal jurisdiction. To the extent that the district court's conclusions are based on findings of fac, however, such findings should no be disturbed unless clearly erroneous. Mylan Lab., Inc. v. Akzo, N.V. 2 F3d 56, 60 (4th Cir. 1993). Rodriguez bears the burden of showing by a preponderance of the evidence that jurisdiction existed. In re Celotex Corp., 124 f 3d 619, 628 (4th Cir. 1997).

We have reviewed the record and the district court's findings and legal conclusions and find no error. Accordingly, we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court, and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

ISIDORO RODRIGUEZ	)	
	)	
Plaintiff,	)	
	)	Civil No. 02-1523-A
v.	)	
	)	
HFP, INC. et al.,	)	
	)	
Defendants.	)	

ORDER

THIS MATTER is before the Court on Plaintiff Isidoro Rodriguez's motion for certification of questions to the Virginia Supreme Court and on Defendants HFP, Inc.'s, IOTA Partners L.P.'s, Edris E. Harbeston's, Jack Harbeston's, and Jerome Barron's motions o dismiss for lack of personal jurisdiction. On December 21, 2000, Judge James C. Cachceris granted Defendants' motion to dismiss for lack of jurisdiction;[1] this is the second iteration of this case.

Plaintiff does not provide any new facts that affect the Court's previous lack of personal jurisdiction over Defendants; therefore he Court adopts Judge Cacheris's previous findings of fact and conclusions of law when he granted the Defendants' motions to dismiss for lack of

---

1

See Rodriguez v. Harbeston, Ca No. 00-1523-A (E.D. Va. December 21, 2000)

personal jurisdiction on December 21, 2002.[2] From Judge Cacheris's previous findings of fact and conclusions of law and for the reasons stated in open court on December 13, 2002, the Court concludes that it lacks personal jurisdiction over Defendants HFP, Inc., IOTA Partners L.P., Edris E. Harbeston, Jack Harbeston, and Jerome Barron; the Court dismisses the complaint as to these Defendants. Furthermore, Plaintiff also fails to allege any new facts hat affect this Court's earlier decision hat it lacked jurisdiction over Defendant Danilo Devis Pereira.[3] thus, the Court dismisses the complaint against Defendant Pereira.

In addition, the Court finds that personal jurisdiction over the remaining Defendants is improper in this Court. Plaintiff fails to plead any facts which confer personal jurisdiction, in this Court, under Virginia's long-arm statute, Va. Code §8.01-328.1(A). Moreover, under the facts set forth in the Complaint, any assertion of personal jurisdiction over the named Defendants would offend due process. The Court finds that it lacks personal jurisdiction over the remaining Defendants. The Court further finds that amendment o the pleadings will not cure the jurisdictional deficiency.

Concluding that the Court lacks personal jurisdiction over Defendants, the Court denies Plaintiff's motion for certification of question to the Virginia Supreme Court. The Court dismisses he complaint as to all Defendants. Therefore, there is no case or controversy, and the Court lacks the power, under the United Sates Constitution, to

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[2]See id.

[3]See Rodriguez v. Pereira, Ca No. 00-1523 (E.D. Va. June 5, 2001)

render advisory opinions[4] and to certify a question to the Virginia Supreme Court. Therefore, it is hereby

ORDERED that Defendants HFP, Inc.'s, IOTA Partners L.P.'s, Edris E. Harbeston's, Jack Harbeston's, and Jerome Barron's Motions to Dismiss for Lack of Personal Jurisdiction are GRANTED,

ORDERED that Plaintiff Isidoro Rodriguez's claims against the remaining Defendants are DISMISSED WITHOUT PREJUDICE. It is also ORDERED that Plaintiff is DENIED LEAVE TO AMEND THE COMPLAINT. Furthermore, it is

ORDERED that Plaintiff Isidoro Rodriguez's Motion for Certification of Questions to the Virginia Supreme Court is DENIED.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 16th day of December, 2002.

/S/
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
12/16/02

[4]See U.S. Const. art. III.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ISIDORO RODRIGUEZ	)	
	)	
	)	
Plaintiff,	)	Civil No 02-1523-A
	)	
vs.	)	December 13, 2002
	)	
HFP, INC., ET AL.,	)	
	)	
Defendants.	)	

REPORTER'S TRANSCRIPT
MOTIONS HEARING

BEFORE: THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: THE RODRIGUEZ LAW FIRM
BY: ISIDORO RODRIGUEZ, ESQ
2304 Farrington Avenue
Alexandria, Virginia 22303

FOR THE DEFENDANTS: PLEDGER & FEORD
BY: BERNARD FEORD, ESQ.
R. HARRISON PLEDGER, ESQ
1489 Chain Bridge Road, Suite 204
McLean, VA 22101

OFFICIAL COURT REPORTER:

RENECIA A. SMITH-WILSON, RMR
U.S. District Court
401 Courthouse Square, 5th Floor
Alexandria, VA 22314
(703)549-5322

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(Court recessed)

(Thereupon, the following was heard in open court at 10:02 a.m.)

THE CLERK: Civil action 02-1523-A, Isidoro RODRIGUEZ versus HFP Incorporated. Are the parties present and ready?

THE COURT: Good morning. If you all would come to the front tables and I invite you to introduce yourself for the record.

MR. RODRIGUEZ: Good morning, Your Honor. Isidoro RODRIGUEZ, attorney pro per, appearing for myself.

THE COURT: All right, good morning, Mr. RODRIGUEZ.

MR. FEORD: Good morning, Your Honor. Bernie Feord on behalf of the defendants HFP, Iota Partners, Jack Harbeston and Edris Harbeston and Jerome Barron. With me is my partner.

MR. PLEDGER: Your Honor, Harrison Pledger.

THE COURT: Good morning.

Mr. Rodriguez, I think that your motion was filed first, and we'll take that up first.

MR. RODRIGUEZ: No, Your Honor. The defendants

filed their motion to dismiss, and I subsequently filed my response as well as the motions for certification to the Virginia Supreme Court as well–

THE COURT: Okay.

MR. RODRIGUEZ: But I'll be glad to argue.

THE COURT: That's right. Well, I'll hear from defendants then.

MR. PLEDGER: Your Honor, let me make a statement for the record.

THE COURT: If you would come to the podium, please.

MR. PLEDGER: For the record, we're appearing here only on the issue of the motion to dismiss for lack of jurisdiction. And we have nothing to say with respect to the other motions that have been filed.

THE COURT: All right.

MR. PLEDGER: In that connection, Your Honor, I would ask the Court to take judicial notice of Judge Ellis's opinion, memorandum opinion of May 6, 2002 in civil action 01-1926-A. It has a direct relationship and bearing upon the issue of where there was a contract entered into between Mr. Harbeston and Mr. RODRIGUEZ, a finding therein by Judge Ellis that Mr. RODRIGUEZ was living in Barranquilla until he came to the United States to live full-time in 2000 – January of 2000.

THE COURT: Barranquilla, Columbia?

MR. PLEDGER: Columbia, yes, sir.

MR. FEORD: Good morning, again, Your Honor.

THE COURT: You're Mr. Feord, right?

MR. FEORD: I'm sure that Your Honor is familiar with the fact that this is the second iteration {sic} of this case and all of the pleadings that have been filed therein, and I will try not to belabor any of those matters that have already been addressed in writing.

It appears that there are perhaps five issues that can be addressed today, being first that there is absolutely no

connection to Virginia in this case. Second being that the contracts in question pursuant to the plaintiff's own complaint and exhibits are contracts between Sea Search-Armada and the law firm of Davis and Rodriguez.

Third being the oft-quoted by Mr. Rodriguez legal ethics opinion 1325 that is somehow gives him property interest; that is an ethics board itself state in the letter to Mr. Rodriguez, nonbinding and advisory only.

And the issue there was merely whether and attorney could sue their own client. And, therefore, there would be no issue of this full faith in credit pursuant to 28 USC 1738 that Mr. Rodriguez claims.

The fourth issue would be that the issue of alter ego and piercing the corporate veil is irrelevant to this case and in fact, to this matter of jurisdiction, Your Honor, and in fact is not properly plead so that anyone could conclude that there was alter egos in this case.

And, finally, the fifth issue and perhaps the one that Your Honor may want to address is even if we were to assume for purposes of argument that Mr. Rodriguez was a Virginia attorney residing in Virginia, whether that is sufficient to establish a nexus to Virginia to have personal jurisdiction.

And, on that basis conceding for purposes of argument that he's an Virginia attorney, we would still argue that that's {sic} insufficient for purposes of jurisdiction over these defendants.

So, given that–

THE COURT: Why don't we do this because I have read both sides' briefs. In your view, what distinguishes this case from the previous one? The conspiracy claim, does that change it?

MR. FEORD: Well, no. The conspiracy claim, Your Honor, is - - first or all, it's only stated that there was a conspiracy to injure his property in this LEO 1325 in his attorney's lien.

THE COURT: But, does that change the nature of the lawsuit and the Court's jurisdictional analysis?

MR. FEORD: Not at all, Your Honor. It's irrelevant to ths Court's jurisdictional analysis. The analysis remains the same as is plead by both parties, the basic framework for looking at personal jurisdiction.

THE COURT: Well, as I understand Mr. Rodriguez's argument, it is that he was engaged in Colombia by this company to do work in connection with a lawsuit in Colombia because he was a Virginia lawyer. And because of his connection as a United States Lawyer, he had credibility and expertise to bring to the case in Colombia. And therefore, that nexus and his office in Virginia is sufficient for personal jurisdiction.

What about that?

MR.. FEORD: Well, I would say two things in response to that, Your Honor. First, I can factually go through the complaint and exhibits and show to Your Honor where Mr. Rodriguez's own exhibits clearly establish his residence and domicile the entire time was Barranquilla, Colombia and not the Commonwealth of Virginia.

Secondly, referring to the memorandum opinion of Judge Ellis that Mr. Pledger asked the Court to take judicial notice of, even Judge Ellis finds– makes a finding of fact that in 1988, Mr. Rodriguez was living in Barranquilla, Colombia which is the first time that Mr. Rodriguez claims to have had contact with Jack Harbeston about whether or not he could assist them in this case.

THE COURT: I'm unfamiliar with Judge Ellis' case. What was the case about?

MR. FEORD: Apparently, Mr. Rodriguez was married, had been living in Colombia, married a woman in Colombia in 1988, had a son in 1989. They continued to reside together in Barranquilla until 1996, I believe, Your Honor, at which time they were divorced, had a custody arrangement worked out in the family court in Barranquilla.

In–January of–

THE COURT: I'm sorry. What was the nature of the nature of the lawsuit? What was the claim for?

MR. FEORD: What it was, I'm trying to lead to that, Your Honor, because in January of 2000, Mr. Rodriguez moves to Virginia and his son visits in 2000 and then he visits in the summer of 2001. And I think the issue in that case is Mr. Rodriguez did not allow his son to return to Columbia.

THE COURT: Oh.

MR. FEORD: Son then the former wife in Columba sued to have the son returned. And that's what that case–

THE COURT: Was it a parental kidnapping case?

MR. FEORD: Okay. So, then, are you saying that his status as a Virginia lawyer is not sufficient basis to find jurisdiction, proper jurisdiction under the Long-Arm Statute?

MR. FEORD: In essence, that's why I said that perhaps the whole case comes down to even if we all agree that for purposes of this argument, Mr. Rodriguez is an Virginia attorney, was a Virginia attorney, even if we conside {sic} –concede that he had residency in Virginia it's still not enough.

If Your Honor were to –if I may refer Your Honor to a couple of cases, the first being American Online verses Houng, H-U-A-N-G at 106 F.Supp. Second 848 which is a case form this Court, Your Honor, in July 13–dated July 13, 2000.

And in that case which involved the Internet and the fact that AOL was in Virginia and someone for out of state was fraudulently using the name AOL and thing of that nature, this Court stated as follows.

These principles compel the conclusion that the two domain name registration agreements form which plaintiff's ACPA claim arises are not sufficient contacts with Virginia for purposes of personal jurisdiction over the defendant in

this case.

While it is clear that the defendant had a contractual relationship, it is settled that a contract between a resident of the forum state and a nonresident defendant does not, by itself, provide sufficient minimum contacts for personal jurisdiction.

This Court cited Ellicott Machine Cor. V. John Holland for the proposition that a contract in and of itself does not automatically constitute sufficient minimum contacts to support personal jurisdiction..

Instead, the jurisdictional analysis must focus on the circumstances of the contract negotiations, the contract's execution, and the relationship of the contract that the contract has to the forum state.

Here, neither the circumstances of the contract's execution or negotiation nor the relationship of the contract to the forum state are sufficient to establish personal jurisdiction.

This Court further relied upon the U.S. Supreme Court case in Burger King. Let's see–

THE COURT: Well, let me ask you this. How do you distinguish this case form English and Smith? English and Smith was a case where the Alexandria lawyer was retained by a California lawyer to –

MR. FEORD: Really quite simply, Your Honor. In English and Smith, here you have a telephone call directly to a Virginia lawyer. And, I'm quoting the case, "whose office are located in Alexandria, Virginia, is recognized authority on forfeiture law and the author of the only book on the subject."

To memorialize their arrangement, Metzger and Pemberton signed a contingent fee agreement in San Francisco, mailed it to Smith. Smith signed the agreement in Alexandria, mailed it back to Metzger.

Smith performed all his work in Virginia in

connection with the defense of the forfeiture case. And Metzger performed all his work in California.

As a part of their work in defending the case, Smith and Metzger also exchanged several telephone calls and letters between Virginia and California.

And that was a whole lot of activity, Your Honor, that was directly related to the issue in the case which had to be with the contingent agreement between two layers, on in California, one in Virginia.

Here, we have a telephone call from Mr. Harbeston to Mr. Rodriguez in Colombia asking him about representation for matters in Colombia.

THE COURT: In Colombia courts?

MR. FEORD: In Columbia courts. Mr. Rodriguez, in his own correspondence–again, these are exhibits, Your Honor. For example, his March 27 letter of 2000, he states, Mr. Rodriguez states that the U.S. Embassy contacted him in September 1997 {sic}, correct date being 1998,{sic}, quote, "because they could neither find any other U.S. barred admitted attorney residing in Colombia nor any Colombian attorney willing to sue the Republic of Columbia.

So, we've got the communication for work only to be in Columbia. The communication is in Columbia.

The reason for hiring was he was a United States attorney. The fact that he was a Virginia–member of the Virginia bar is incidental, which Mr. Rodriguez himself admits or admitted in argument before Judge Cachceris when Judge Cachceris on this very issue said it didn't matter if you were a New York lawyer, a Nebraska lawyer or any other state lawyer, to which Mr. Rodriguez said yes, it makes no difference whatever.

That in a nutshell–I don't want to keep going on because I'm sure Your Honor–

THE COURT: I was going to say I've now asked you the questions that I have. Let me hear from Mr. Rodriguez.

MR. FEORD: Thank you, Your Honor.

MR. RODRIGUEZ: Good morning, Your Honor.

THE COURT: Good morning.

MR. RODRIGUEZ: May it please the Court. This is a case of first impression. This is not a case dealing with personal jurisdiction based on contracts. It is a case dealing with personal jurisdiction to enforce the Virginia State Bar and the Virginia law on enforcement of the Virginia attorney's lien.

I would–I'm at a disadvantage because my opposing counsel failed to file any reply briefs to my numerous briefs that touched on all of the legal points and only focused on the issue of contracts.

Again, this is not a contract's case. This is–and that's why 1738 comes into play because of the substantive law of Virginia where the Supreme Court of Virginia said there is not limitations to enforce a Virginia attorney's lien.

Now, the distinguishing factor of this case is I was retained to provide pro hac vice {sic} litigation service, fiduciary and litigation services to the largest contact suit by American citizens again a foreign power.

Because nobody else in Columbia or any other lawyer in the United States was willing to take on the litigation.

And because of the political clout of the parties, the defendants, they were able to get through a former Congressman, Mr. Vanderjack {sic}, and insertion by the –the State Department to see if I would be willing to take the case.

At the time, I had just left a corporate position as general counsel in creation of a coal mine down in Colombia and was in the process of determining where I was going to set up an office. And I was on a businessman's VISA and still a resident of Virginia when I was down in Columbia when I was contacted.

And because of my –

THE COURT: From the standpoint of the jurisdictional analysis, your claim here has to be analyzed with respect to Virginia Long-Arm Statute. Help me with your view of why the Virginia Long-Arm Statute permits exercise of personal jurisdiction in this case.

MR. RODRIGUEZ: Because as I stated both before Judge Cachceris and as well as I stated in all the documents as well as the former complaint in this case, I was retained because I was a U.S. citizen and a lawyer, a U.S. lawyer and in this instance, a lawyer in Virginia. And that's why it made a difference.

If I was a lawyer in Washington or in Idaho which had similar statutes with regard to protection or their respective attorney's lien, that's why I was retained.

And that is the underpinning of jurisdiction for this Court because this Court sits as a Virginia Supreme Court.

And the question is will Virginia provide the same protection to a Virginia attorney providing pro hac vice services as compared to a Virginia attorney who is sitting here in Alexandria?

And there is a problem. If it says no, a Virginia attorney providing pro hac vice service is different form a Virginia attorney, there is an equal protection argument.

THE COURT: I've read that in your brief and I—and while I understand what you said there, I want to focus in on just the Virginia Long-Arm Statute and the constitutional principles. And you said you argued this to Judge Cachceris and so I'm trying to make sure—

MR. RODRIGUEZ: Well—

THE COURT: Let me finish the question. You don't know what I'm about to say. I want to make sure that I understand what your position is.

As I understand it, you're suggesting that because of the fact you are a Virginia lawyer—and because the fact that you are a Virginia lawyer that –and because the Virginia State Bar had ruled that a—that the –it would not

be unethical for you to sue you client and pursue an attorney's lien for attorney's fee, that that is a basis to exercise in personam jurisdiction over nonresidents of Virginia just by the fact that you're a Virginia lawyer.

This could have happened in England, and you're saying that because you are a Virginia lawyer working in an office in England, that you could sue your client here in Virginia to pursue an attorney's lien to collect fees and that you could exercise personal jurisdiction over resident of England.

And I have a problem with that argument. I need you to help me understand how it works for you.

MR. RODRIGUEZ: Okay. Firs, this was not presented to Judge Cachceris because he ignored entire the issue of the statutory rights as I addressed the issue both under collateral estoppel—

THE COURT: If you would focus in on the question, it would be very helpful to me.

MR. RODRIGUEZ: Okay. I will focus on you question. Because of the fact that prior to 1993, I did not change my residency to Columbia, all facts relate to my being a resident of Virginia.

But apart from that, I filed my application for a Virginia State Bar ethics opinion, the Virginia Bar state that , yes, because I was a Virginia attorney, my fiduciary duty to my client was governed wherever I am, throughout the world. That I had a duty to protect their interest totally.

And, because of that, and because I was subject to their jurisdiction, the Virginia State Bar, for any type of ethical or fiduciary responsibility which is the key of why a man by the name of Isidoro Rodriguez was sought out.

Because there are a lot of Rodrigeuzes {sic} but not Isidoros. But they could have hired other Hispanic lawyers. But they hired me because I was a U.S. citizen and a licensed attorney form the particular state bar because I had to be—the fiduciary responsibilities that I received as the

consummate board of directors in order for them to have jurisdiction to sue Columbia, gave me total powers.

And that's why that was the key and that's why I needed that holding by the Virginia State Bar. And they said, yes, your duties are governed by us. And therefore, also, you can sue under Virginia. That's essentially--

THE COURT: I understand. The Virginia State Bar does not have the power to award damages or order injunctive relief. All the Virginia State Bar has the ability to do is regulate you license. And a license is a privilege to practice law. It is not binding on me in any way. In fact, they don't say its binding on me in any way. It say's it's not binding.

MR. RODRIGUEZ: But the state court does.

THE COURT: But come back to my question now about in personam jurisdiction because I think that you're missing what I'm focusing in on. And I'm really trying to understand your argument.

The Virginia Long-Arm Statute does not give you world wide jurisdiction because you're a Virginia law{sic}. If I accept your argument, that means any Virginia lawyer who works in England or Australia and who works in Australia completely for the client and the client fails to pay could bring a collection lawsuit here in Virginia against Australian clients.

That doesn't fly under due process under the Fifth Amendment. Unless you can give me some case law that says it does, I don't understand your argument.

MR. RODRIGUEZ: I believe I did give you case law which was not address by the Court. The Fourth Circuit most recently on the 5th of December came out with a case in ePlys. And in that case, there was a Canadian—

THE COURT: Versus Aboud?

MR. RODRIGUEZ: That's right. And they discussed the issues of the interest of the state of Virginia in –finding personal jurisdiction where this person had no contact, not

even a telephone conversation with anyone in Virginia.

And, there the Fourth circuit held, which actually overturned—they sort of paused when the Court here was holding that there was not jurisdiction because of the concern of the flood of possible litigation for Internets.

But there the Court, the Fourth Circuit, held that there was going to be jurisdiction. And that I think is a controlling precedent in this case.

Here, I provided pro hac vice services as a Virginia lawyer and was retained specifically because I was a Virginia lawyer.

THE COURT: Okay. You've said that now three times. I understand that. But, you were engaged as a lawyer to file a lawsuit in Colombian courts involving Columbian clients, and you were based in Columbia. You weren't here when you were engaged for the case. You were in Columbia. Isn't that right? Is that right?

MR. RODRIGUEZ: No, that's not correct.

THE COURT: You were not in Columbia when you—

MR. RODRIGUEZ: I was not engaged to file a lawsuit. I was engaged to provide fiduciary duties as a Virginia lawyer because I received the powers—

THE COURT: My question is when you were hired as a lawyer , where were you located?

MR. RODRIGUEZ: I was in transit. I didn't even know where I received the phone call, either form the Department of State or form Mr. Harbeston.

THE COURT: Okay. Okay.

MR. RODRIGUEZ: But that's not- - that's immaterial in this day and age of global negations.

THE COURT: So, under your theory then, my hypothetical then, a Virginia lawyer who works in Australia, who works for an Australian client, the client fails to pay that lawyer, can bring a collection lawsuit and secure personal jurisdiction against the Australian corporation here

in Virginia and the Virginia Supreme Court would hold that would be proper exercise of in personam jurisdiction under the Long-arm Statute?

MR. RODRIGUEZ: No., Your Honor. I'm not subscribing to that hypothetical because it doesn't place the facts that are in issue in this case. The facts are very distinguishable here.

The issue is as a Virginia attorney providing pro hac vice, I have the same rights as a Virginia attorney who is sitting in Virginia handling local cases.

And if the question is that that's disputable, then it should go to the Virginia Supreme Court to seek a judicial opinion.

THE COURT: Okay. Well—

MR. RODRIGUEZ: The next question that I would like to address, yes, there is a connection with regard to the –the taking—illegal taking of my son out of the Untied States in violation of his rights as a U.S. citizen to the Republic of Colombia. And that is being addressed.

And Judge Ellis' opinion did not address where I was residing because he didn't take an of the facts as to the fact that I was—I had not received a VISA to reside in Columbia until 1993.

THE COURT: Okay. All right. Well, I have now asked you the questions that I have with respect to personal jurisdiction.

Unless there is something more that you want to say that's not in your brief or something that you believe my questions have raised, I've now asked the questions I have of you. Thank you.

Mr. Feord, anything further?

MR. FEORD: Your Honor, no, thank you.

THE COURT: All right. Let the record reflect this is the matter of Isidoro Rodriguez, Esquire versus HFP and others. And the matter is before the Court on the defendant Harbeston's and Barron's motion to dismiss for lack of

personal jurisdiction under Virginia Long-Arm Statute.

The Court has considered the arguments and the submissions of both sides and renders the following ruling in connection with the case.

I think the question presented is whether or not the plaintiff has facts which would justify an extension of personal jurisdiction over Ms. Harbeston, Mr. Harbeston or Mr. Barron under the Virginia Long-Arm Statute and consistent with due process.

It seems to me that persons I enumerated are not Virginia residents and that the allegations thee of the complaint seem to focus in on Mr. Rodriguez's status as an attorney who is admitted to practice as a Virginia lawyer and who secured a Virginia bar ethics opinion which in my view, the ethics opinion really addresses whether or not it is ethical for a lawyer to bring a lawsuit against his former client to collect fees to secure a claim for an attorney's lien for services rendered.

I have now reviewed the submissions of both sides as well as the ruling of Judge Cachceris on December 21, 2000. And it seems to me that the facts of this case are hard to distinguish. That is to say, it's and for me to distinguish factually between this lawsuit and the case that was before Judge Cachceris in 00-1523-A.

And I also find it difficult to find a nuance in plaintiff's argument that would establish sufficient jurisdiction under 8.01 328.1 (a)(3) or (a)(4) because it seems to me that this case stems form Mr. Rodriguez being retained to perform legal services in Colombia for clients who engaged him in Columbia and to pursue a claim against them in Columbia courts as well as acts as a fiduciary in Columbia.

Mr. Rodriguez's arguments is that he was engaged specifically because he is an active attorney licensed form Virginia and that the clients believed that his licensing by the Commonwealth of Virginia would insure that he would

adhere to high ethical standards and also that the state bar would supervise in some way his activities as a fiduciary.

I find that this affiliation with the Virginia State Bar, even the fact that he's a member of a the bar is insignificant for purposes of trying to ascertain whether there is a basis to exercise personal jurisdiction under the Long-Arm Statutes and consistent with due process.

It seems to me that the facts as set forth basically demonstrate that Mr. Rodriguez was in Colombia. He was working in Columbia, not Virginia. The litigation work had to do the Republic of Colombia and the courts there. The fiduciary work had to do with the activities in Columbia.

I don't see any contact or any activities that occurred here in Virginia or nay suggestion that even if there were a conspiracy between these former clients not to pay Mr. Rodriguez's bill, that that somehow is causing a tort in Virginia that would be sufficient under the Long-Arm Statute.

I conclude that for reasons that I will adopt Judge Cachceris' ruling and note that the fourth Circuit affirmed that as well. And I may supplement this ruling with some additional authorities. But it seems to me that under the case law, that there is just no basis here to exercise personal jurisdiction under the Long-Arm Statute.

It would, I thing defy due process to suggest that under these facts that the fact that the person employed as a lawyer in another county and that the person is not paid, that they would have a claim that they could bring for collection of attorney's fees in Virginia merely by virtue of their status as an attorney would extend due process well beyond the parameters of the Constitution and certainly well beyond the Virginia Long-Arm Statute.

I note that the –even the contract of October 28, 1988 is on Mr. Rodriguez's stationary in Barranquilla, Columbia where his office was located at the time.

I just don't see. I've tried, Mr. Rodriguez, to see it

your way, and I've tried to review all your cases and your submissions.

We have an honest difference about the law. And for those reasons, I will dismiss the action at this time.

Exception is preserved. Thank you.

MR. RODRIGUEZ: thank you, Your Honor.

MR. PLEDGER: Your Honor, might I ask the Court for clarification. We had filed on behalf of defendant Iota Partners and HFP, Inc. motions to dismiss o the same grounds which were also set for—noticed for hearing today.

THE COURT: Oh. Your briefs didn't say—have all those names in it, and it would apply to the defendants who joined the motion which included Jack Harbeston, HFP, Incorporated, Iota Partners, LP and Jamome Barron.

MR. PLEDGER: There is Iota HFP, Barron and the tow Harbestons. And we've filed motions and briefs on all five of those defendants.

THE COURT: Well, all the defendants, it would—the motion is granted.

MR. PLEDGER: Thank you, Your Honor.

THE COURT: Thank you.

MR. RODRIGUEZ: One point of clarification your Honor. I want to make sure you're denying the motion for certification by the Virginia Supreme Court on the issue of the statute.

THE COURT: There is no case to certify an issue on it in my view. If I don't have personal jurisdiction, I don't have jurisdiction to do anything. That would be advisory—for me to ask the Supreme Court to render an opinion would be advisory. And Article Three courts can't ask advisory opinions.

MR. RODRIGUEZ: Thank you, Your Honor.

MR. FEORD: Thank you.

MR. PLEDGER: Thank you. Good day, Your Honor. Have a nice Holiday.

THE COURT: Your all take care.

(thereupon, the proceeding concluded at 10:33 a.m.)

CERTIFICATE OF REPORTER

I, Renecia Wilson, and official court reporter for the United States District Court of Virginia, Alexandria, Virginia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the motions hearing in the case of Rodriguez vs. HFP, Inc. et al.

If further certify that I was authorized and did report by stenotype the proceedings and evidence in said motion hearing, and that the foregoing pages, number 1 to 28, inclusive, constitute the official transcript of said proceeding as taken from my shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 13th day of March, 2003.

_____/S/_____
Renecia Wilson, RMR/CM
Official Court Reporter

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 18, 2002

No. 01-1884
CA-00-1523-A

ISIDORO RODRIGUEZ, Esq
Plaintiff - Appellant

v.

JACK HARBESTON; SEA SEARCH ARMADA; ARMADA COMPANY; IOTA
PARTNERS; DANILO DEVIS PEREIRA

Defendants - Appellees

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied

For the Court,

/s/ Patricia S. Connor
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01—1884

ISIDORO RODRIGUEZ, Esq.,

Plaintiff - Appellant,

versus

JACK HARBESTON; SEA SEARCH ARMADA; ARMADA COMPANY; IOTA PARTNERS; DANILO DEVIS PEREIRA,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (CA-00-1523-A)

Submitted: November 9, 2001 Decided: November 28, 2001

Before LUTTIG, MOTZ, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Isidoro Rodriguez, Appellant Pro Se. R.Harrison Pledger, Jr., Bernard G. Feord, Jr., PLEDGER & FEORD, P.L.C., McLean, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Isidoro Rodriguez appeals the district court orders dismissing his complaint for lack of personal jurisdiction. We review de novo the district court's legal conclusions concerning personal jurisdiction. To the extent that the district court's conclusions are based on findings of fact, however, such findings should not be disturbed unless clearly erroneous. Mylan Lab., Inc. V. Akzo. N.Y., 2 F.3d 56, 60 (4th Cir. 1993). Rodriguez bears the burden of showing by a preponderance of the evidence that jurisdiction existed. In re Chelates Corp., 124 F.3d 619, 628 (4th Cir. 1997).

We have reviewed the record and the district court's findings and legal conclusions and find no error. Accordingly, we affirm on the reasoning of the district court. See Rodriguez v. Harbeston, No. CA-00-1523-A (E.D. Va. Dec. 21, 2000 & June 5, 2001). We deny Rodriguez's motion seeking certification of a question from the Supreme Court of Virginia. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court, and
argument would not aid the decisional process.

AFFIRMED

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1774

In re ISIDORO RODRIGUEZ,

Petitioner

On Petition for Writ of Mandamus

Submitted: June 29, 2001 Decided: July 26, 2001

Before LITTIG., MOTZ, and KING, Circuit Judges

Petition denied by unpublished per curiam opinion

Isidoro Rodriguez, Petitioner Pro Se.

Unpublished Opinions are not binding precedent in this circuit. See Local Rule 36©).

PER CURIAM:

Isidoro Rodriguez filed this mandamus petition requesting that the Court compel the district court to reinstate his complaint, order discovery, convene a jury to determine facts and to comply with Rule 4(f) of the Federal Rules of Civil Procedure and the Inter-American Convention on Letters of Rogatory, 13 Int'l Legal Material. Mandamus is a drastic remedy to be used only in extraordinary circumstances, Kerr v. United States Dist Court, 426 U.S. 394, 402 (1976). Mandaus relief is only available when there are no other means by which the relief sought could

be granted, In re Beard, 811 F.2d 818, 826 (4th Cir. 1987), and may not be used as a substitute for appeal. In re Catawaba Indian Tribe, 973 F.2d 1133, 1135 (4th Cir. 1992). The party seeking mandamus relief carries the heavy burden of showing that he has "no other adequate means to attain the relief he desires: and that his entitlement to such relief is "clear and indisputable." Allied Chem. Corp. V. Daiflon Inc., 449 U.S. 33, 35 (1980).

Because Rodriguez has not shown that there is not an available remedy to that he is not entitled to the requested relief, we deny his petition for mandamus relief. We dispense with oral argument because the facts and legal contentions are adequately presented in the material before the court and argument would not aid the decisional process.

PETITION DENIED

UNPUBLISHED

FILED
July 24, 2001

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1671

In re ISIDORO RODRIGUEZ,

Petitioner

On Petition for Rehearing En Banc

The Petitioner's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court

/s/ Patricia S. Conner
CLERK

UNPUBLISHED

FILED
June 19, 2001

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1129

ISIDORO RODRIGUEZ,

Plaintiff-Appellant,

versus

JACK HARBESTON; ARMADA COMPANY; SEA SEARCH ARMADA IOTA PARTNERS;

Defendants- Appellees,

and

DANILO DEVIS PEREIRA

Defendant.

On Petition for Rehearing En Banc

The Appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court
/s/ Patricia S. Conner CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ISIDORO RODRIGUEZ, ESQ.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 00-1523-A
	)	
DANILO DEVIS PEREIRA,	)	
	)	
Defendant.	)	

ORDER

THIS MATTER is before the Court on the April 25, 2001 Report and Recommendation of Magistrate Judge Theresa Carroll Buchanan addressing Plaintiff's Motion for Stay of Default Proceeding and Motion for Leave to Conduct Nonparty Depositions.

Federal Rule of Civil Procedure 72(b) requires a district judge to whom a magistrate's Report and Recommendation is assigned to "make a de nova determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule." FED. R. CIV. P. 72(b). Plaintiff has made a timely written objection to the magistrate judge's report and recommendation dismissing Plaintiff's claims against Defendant Danilo Devis Pereira for lack of personal jurisdiction. Therefore, the issue before the Court is whether the exercise of personal jurisdiction over Defendant is proper in that this Court may not exercise

personal jurisdiction over Defendant. Therefore, the Court adopts the Report and Recommendation of Magistrate Judge Buchanan. Accordingly, Plaintiff's complaint is DISMISSED WITHOUT PREJUDICE.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff Isidoro Rodriguez, Esquire, a member of the Virginia bar, alleges that he was contacted in 1988 and asked to represent Jack Harbeston, Sea Search Armada ("SSA"), Armada Company, and IOTA Partners in payloads of sunken treasure ships located off the coast of Columbia. (Compl. ¶91 13-18.) Through various agreements, Plaintiff's clients authorized Plaintiff to file and prosecute a lawsuit in Columbia on behalf of SSA, a limited partnership with an interest in the "San Jose," a sunken Spanish galleon. *(Id.* ¶91 20-22, 26-32.) After negotiating an appropriate legal strategy, Plaintiff negotiated with Danilo Devis Pereira, a Columbian attorney, whereby Mr. Pereira assisted Plaintiff in the prosecution of SSA's case in Barranquilla, Columbia. *(Id.* ¶91 23-26.) Plaintiff conducted some work from his office in Virginia, but also established a residence in Barranquilla, Columbia during his business relationship with Mr. Pereira; Plaintiff spent a substantial amount of time in Columbia. *(Id.* ¶ 22; P1. Br. in Supp. of Mot. for Leave to Conduct Deps.)

Plaintiff and Mr. Pereira first entered into an oral agreement to perform jointly the galleon work. Plaintiff and Mr. Pereira subsequently entered into two written agreements, which were executed in Columbia, whereby the parties modified the division of the proceeds from their work. *(Id.* ¶91 43, 45.) Plaintiff alleges that Mr. Pereira breached their contractual agreements and conspired with Plaintiff's former clients to cause tortious injury to Plaintiff.

Plaintiff filed this action against Jack Harbeston, Sea Search Armada, Armada Company, IOTA Partners, and Mr. Pereira on September 12, 2000. During the period between November 16, 2000 and November 22, 2000 all of the individuals and entities except Defendant Danilo Devis Pereira filed motions to dismiss for lack of personal jurisdiction. Judge James C. Cachceris granted the motions on December 21, 2000.[5] Judge Cachceris held that Plaintiff's Virginia State Bar affiliation alone did not amount to a sufficient connection to Virginia by the defendants to permit the court to exercise personal jurisdiction over the defendants. (Pl.'s Br. in Supp. of his Mot. for Leave to Conduct Nonparty Deps. at 6 n.8.) Judge Cachceris' ruling left Defendant Danilo Devis Pereira ("Defendant") as the sole remaining defendant in this case.

On February 15, 2001, having recognized Defendant's failure to appear in this case, Judge Claude M. Hilton scheduled a hearing for March 16, 2001 to consider whether to enter a default against Defendant. Plaintiff then filed a motion to stay the default proceeding, and noticed the motion for the March 16th hearing date. At the hearing on the issue of entry of default, Magistrate Judge Theresa C.
Buchanan took the issue of entry of default and Plaintiff's motion for stay under advisement and asked Plaintiff to submit to the court a memorandum addressing, among other things, the grounds for the Court's personal jurisdiction over Defendant. On March 29, 2001, Plaintiff filed a motion for leave to conduct nonparty depositions, which he noticed for a hearing on April 6, 2001. Plaintiff's

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[1]Plaintiff appealed these dismissals to the Fourth Circuit Court of Appeals on January 16, 2001.

accompanying memorandum included arguments in support of his motion for depositions and provided the requested information regarding the basis of the court's jurisdiction over Defendant. Judge Buchanan took Plaintiff's motions under advisement before the noticed hearing and ruled on the papers.

Judge Buchanan issued her Report and Recommendation on April 25, 2001. Judge Buchanan found that personal jurisdiction over Defendant was not proper in this Court because Defendant's contacts with Virginia do not satisfy any of the grounds for personal jurisdiction articulated in Virginia's long—arm statute. Therefore, Judge Buchanan recommended that Plaintiff's case be dismissed without prejudice. Plaintiff objects to Judge Buchanan's recommendation.

DISCUSSION

Standard of Review

Rule 12(b) (2) of the Federal Rules of Civil Procedure permits dismissal of an action in which the forum court lacks the requisite personal jurisdiction. FED. R. Civ. P. 12(b) (2). The Court must consider the pleadings and affidavits in a light most favorable to the plaintiff—here, Mr. Rodriguez. *See Compuserve, Inc. v. Patterson,* 89 F.3d 1257, 1262 (6th Cir. 1996) . For a 12(b) (2) motion, the Court does not weigh the controverting assertions of the party seeking dismissal; the Court need only find that Plaintiff has made a prima facie showing of jurisdiction. See id.

Analysis

Personal jurisdiction over Defendant is not proper in

this forum. Under Virginia law, the Court may exercise personal jurisdiction over a party if: (1) the facts and circumstances of the case fall within the reach of the Virginia's long-arm statute, *see* VA. CODE 8.01—328.1(A); and (2) the exercise of personal jurisdiction does not offend due process. *See, e.g., Heathmount A.E. Corp. v. Technodome.com,* 106 F. Supp. 2d 860, 864 (E.D. Va. 2000); *Robinson v. Egnor,* 699 F. Supp. 1207, 1211-12 (E.D. Va. 1988) (citing *Blue Ridge Bank v. Veribanc,* 755 F.2d371, 373 (4th Cir. 1985)). If jurisdiction is not appropriate under the first prong of the test, the Court need not analyze the facts of the case under the second prong of the test.

The Court finds that the exercise of personal jurisdiction over Defendant is not proper in Virginia because the facts of this case do not fall within the reach of the long-arm statute. The Virginia long-arm statute provides in relevant part:

A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:

1.Transacting any business in this Commonwealth;
2. Contracting to supply services or things in this Commonwealth;
3.Causing tortious injury by an act or omission in this Commonwealth;
4.Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth.

VA. CODE § 8.01-328.1. Plaintiff asserts that personal

jurisdiction over Defendant is proper under (A) (1) and A(4) of Virginia's long-arm statute. (Pl.'s Exceptions to Rpt. and Recommendation at 5.) However, the circumstances surrounding this case do not permit jurisdiction under either subsection.

There is no evidence that Defendant transacted business in Virginia. See VA. CODE § 8.01-328.1(A) (1). There is no indication that Defendant ever traveled to Virginia or physically occupied an office here.[6] In fact, Plaintiff only argues that Defendant litigated and negotiated with the
Republic of Columbia while *Plaintiff* resided in Virginia. The basis of Plaintiff's argument that Defendant "transacted business" in Virginia is Defendant's association with Plaintiff while Plaintiff was in Virginia. However, Defendant maintained his offices in Columbia and performed his duties as Plaintiff's associate while in Columbia. Moreover, the evidence before the Court demonstrates that a great deal of Defendant's contacts with Plaintiff took place while Plaintiff himself was in Columbia. (Compl. Exs. 7 10 11 13 15 17, etc.) Mere association with Plaintiff, a Virginia resident, does not amount to "transacting . . . business" in this Commonwealth." VA. CODE § 8.01—328.1(A) (1).

Jurisdiction over Defendant is also improper on the grounds that Defendant supposedly caused tortious injury in this Commonwealth by an act or omission outside this

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[2] The Letterhead for "Devis & Rodriguez, Attorneys andCounselors at Law" bears a Columbian address, (Compl. Ex. 7);Defendant and Plaintiff signed the January 3, 1991, March 15,1991, and May 6, 1991 legal services agreements in Columbia;Plaintiff and Defendant also signed Plaintiff's powers ofattorney in Columbia *(Id.* Ex. 15, 17.), etc.

Commonwealth while Defendant regularly conducted business, or engaged in any other persistent course of conduct, or derived substantial revenue from services rendered, in Virginia. See VA. CODE § 8.01-328.1(A) (4). Defendant's alleged breach of his contract, breach of fiduciary duty, and interference with Plaintiff's lien may amount to "causing tortious injury" in this forum; however, Defendant did not engage in any persistent course of conduct in Virginia. Again, Plaintiff argues that Defendant's association and agency with Plaintiff amounts to a persistent course of conduct from which Defendant derived "substantial revenue." There is no indication that Defendant engaged in any continuous or systematic contact with Virginia, either through business or otherwise. Defendant's principal place of business was not in Virginia, nor did Defendant seek out Virginia as a business forum. Plaintiff extended himself through Defendant so that Plaintiff could provide services in Columbia, not vice versa. Plaintiff notes that Defendant acted as agent for Plaintiff. (Pl.'s Exceptions at 8.) Therefore, Plaintiff availed himself of an opportunity to transact business in Columbia through his agent; Defendant did not use Plaintiff as an agent to conduct business in Virginia. *See, e.g., Hanson v. Denckla,357* U.S. 231, 253 (1958) (holding that the principal inquiry is whether the nonresident purposefully availed himself of the privilege of conducting business in the forum state, thus invoking the benefits and protections of the forum state's laws) . Moreover, Defendant did not have continuous or persistent contact with Virginia to perform revenue-producing services here. See VA. CODE § 8.01—328.1(A) (4) . Instead, Plaintiff formed the relationship with Defendant so that Plaintiff could have a business contact and means for Plaintiff to monitor his revenue-producing business relations in Columbia. Therefore, there is no indication that Defendant regularly associated himself with Virginia to solicit business here or derive revenue from

Virginia. *See id.* Consequently, this Court may not properly exercise personal jurisdiction over Defendant.

Plaintiff argues that it should be clear that Defendant has sufficient contact with Virginia to warrant the exercise of jurisdiction over Defendant because Plaintiff has a viable claim for an attorney's lien under Virginia law. (Pl.'s Exceptions at 10—12.) However, Plaintiff conflates a finding of a viable cause of action with a finding of proper jurisdiction. *(Id.* at 11-12 (arguing that the magistrate judge did not have jurisdiction to review the State Bar's Legal Ethics Opinion that Plaintiff could sue to protect his statutory attorney's lien); *id.* at 13-14. (arguing that Virginia's long-arm statute necessarily permits personal jurisdiction to enforce Virginia' s attorney' s lien) .) Findings of a viable cause of action and proper jurisdiction are separate and distinct. *See* FED. R. Civ. P. 12(b) (2), 12(b) (6) (permitting dismissal of a claim on the separate, and alternative, grounds that (1) jurisdiction is not proper over the alleged offender, or (2) the pleader has not pled facts supporting a claim for which relief can be granted) . Therefore, it is not sufficient that Plaintiff has demonstrated that he may be entitled to judgment on his claim to enforce his attorney's lien. (Dec. 6 Affidavit of Isidoro Rodriguez, Ex. 6: Virginia State Bar Legal Ethics Opinion #1325 at 3 (opining that it would not be ethically prohibited for an attorney to bring an action against his client for past—due attorney's fees and costs).)[7] Plaintiff must <u>also</u> demonstrate

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[3] Notably, Plaintiff cites the Virginia Bar Ethics Opinion as indicating that the Virginia Bar advised Plaintiff that he could sue Defendant, Plaintiff's former "law partner," for Plaintiff's attorney's lien. (P1.'s Exceptions at 12 —13.) However, the Ethics Opinion demonstrates that Plaintiff did not alert the Bar of his desire to sue Defendant, only of his desire to sue his former "client." (Ethics Opinion #1325 at 3.) Nothing

that jurisdiction over Defendant is proper in this Court. As indicated above, Plaintiff has not demonstrated that jurisdiction over Defendant is proper here.

For these reasons, the Court finds that the recommendation of dismissal is supported by Defendant's lack of sufficient contacts with this jurisdiction. The Court further finds that amendment to the pleadings will not cure the jurisdictional deficiency. Therefore, it is hereby

ORDERED that Magistrate Judge Buchanan's Report and Recommendation is ADOPTED. It is further

ORDERED that Plaintiff's claims against Defendant are

DISMISSED WITHOUT PREJUDICE.

The Clerk is directed to forward a copy of this Order to *pro* se Plaintiff and Defendant.

Entered this 5th day of June, 2001.

----------/s/----------

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
06/05/01

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in the Ethics Opinion makes reference to the exercise of jurisdiction over Defendant, or that suit would be proper against Defendant in any particular jurisdiction, if at all. In fact, the Bar was under the impression that Defendant would bring a suit similar to Plaintiff's against the former client, not that Defendant would be a named defendant in Plaintiff's suit. *(Id.* at 2.)

UNITED STATES DISTRICT COURT JUDGE
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ISIDORO RODRIGUEZ, ESQ.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.00-1523-A
	)	
DANILO DEVIS PEREIRA,[1]	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

The Court was faced with the matter addressed herein upon the plaintiff's filing of two motions. On March 7, 2001, plaintiff filed a "Motion Pursuant to Right to Due Process, Provisions of Inter-American Service Convention, and Federal Rules of Civil Procedure Effective December 1, 2000, for a Stay of Default Proceeding Pending Discovery of Non-Party Witnesses and Service of Process in Accordance with Said Treaty so to Assure Enforcement of a Default Judgment in the Republic of Colombia" (hereinafter, "Motion for Stay of Default Proceeding"). On March 29, 2001, plaintiff filed a "Motion for Leave to Conduct the Immediate Depositions of Nonparty Witnesses Regarding the Status of His Perfected Virginia Statutory Attorney's Lien" (hereinafter, "Motion for Leave to Conduct

[1] The former lead defendant, Jack Harbeston, was dismissed from the case.

Nonparty Depositions"). The undersigned Magistrate Judge has taken both of these motions under consideration.

I. PROCEDURAL HISTORY

On September 12, 2000, plaintiff filed this action against defendants Jack Harbeston, Sea Search Armada, Armada Company, IOTA Partners, and Danilo Devis Pereira. During the period of November 16, 2001, through November 22, 2001, four of the five defendants - Jack Harbeston, Sea Search Armada, Armada Company, and IOTA Partners - filed motions to dismiss for lack of personal jurisdiction. On December 21, 2000, the Honorable James C. Cachceris, stating from the bench that the plaintiff's Virginia State Bar affiliation alone was not a sufficient connection to establish the Court's personal jurisdiction over the defendants, (Pl.'s Br. in Supp. of His Mot. for Leave to Conduct Nonparty Deps. p. 6 n.8), granted all four of these motions to dismiss, thereby leaving Danilo Devis Pereira as the sole remaining defendant in this case. On January 16, 2001, plaintiff appealed these dismissals to the Fourth Circuit Court of Appeals.

On February 15, 2001, having recognized defendant Pereira's failure to appear, the Honorable Claude M. Hilton scheduled a default hearing for March 16, 2001. On March 7, 2001, plaintiff filed his Motion for Stay of Default Proceeding, which he noticed for a hearing on March 16, 2001. At the hearing, Judge Buchanan took this motion under advisement and asked plaintiff to submit to the Court a memorandum addressing, among other things, the grounds for the Court's personal jurisdiction over the defendant. On March 29, 2001, plaintiff filed his Motion for Leave to Conduct Nonparty Depositions, which he noticed for a hearing on April 6, 2001, and an accompanying memorandum containing both the

arguments in support of this motion and the supplementary information requested by Judge Buchanan on March 16, 2001. Having decided to rule on the papers, the undersigned took this motion under advisement before the noticed hearing.

II. FACTUAL BACKGROUND

Plaintiff, a member of the Virginia Bar, alleges that he was contacted in 1988 and asked to represent the interests of the former defendants (Jack Harbeston, Sea Search Armada, Armada Company, and IOTA Partners) in payloads of sunken treasure ships located off the coast of Columbia. (Compl. ¶¶ 13-18.) Plaintiff claims that, through various agreements, he was authorized to file and prosecute a lawsuit in Columbia on behalf of former defendant SSA, a limited partnership with an interest in the *San Jose,* a sunken Spanish galleon. (Id.¶¶ 20-22, 26-32.) According to plaintiff, after developing an appropriate legal strategy, he negotiated an agreement with defendant Pereira, a Columbian attorney, whereby defendant assisted plaintiff in the prosecution of defendant SSA's case in Barranquilla, Colombia. (Id. ¶ ¶ 23-26.) Plaintiff alleges that defendant breached this agreement and conspired with the former defendants to cause further tortious injury to plaintiff. (Id. ¶¶ 60-64; Pl.'s Br. In Supp. Of His Mot. For Leave to Conduct Nonparty Deps. at 14-15.)

III. ANALYSIS

Upon a full review of the pleadings and other pertinent submissions, the undersigned Magistrate Judge finds, for the following reasons, that the Court does not have jurisdiction over the defendant.

According to plaintiff, defendant has three contacts with the State of Virginia. First, defendant and plaintiff, a Virginia

resident[2] and attorney, allegedly entered into an oral agreement whereby they associated for the purpose of providing legal services to defendant SSA in Columbia and agreed to equally split the costs of and proceeds from their work. (Compl. ¶¶ 23-25; Pl.'s Br. in Supp. of His Mot. for Leave to Conduct Nonparty Deps. at 13-14.) Pursuant to two subsequent written agreements, dated March 15, 1991, and May 6, 1991, which were executed in Columbia, the parties supposedly modified the division of proceeds from their work from a fifty-fifty split to a eighty— twenty split in favor of defendant. (Compl. ¶¶ 43, 45, Ex. 11, Ex 13.) Second, plaintiff claims that through this relationship, defendant benefitted financially from his business contacts to plaintiff, a Virginia resident and attorney. (Pl.'s Br. In Supp. Of His Mot. For Leave to Conduct Nonparty Deps. at 13-15) Finally, plaintiff contends that defendant breached their business agreement and a fiduciary duty owed thereunder as an agent of plaintiff, a Virginia resident and attorney. (Id. At 13, 15-16)

The burden is on the plaintiff to show by a preponderance of the evidence that the Court has personal jurisdiction over the defendant. This burden is carried by the satisfaction of a two-step inquiry. See Mylan Laboratories, Inc. v. Akzo, N.V., 2 F.3d 56, 60 (4th Cir. 1993); Roche v. Worldwide Media, Inc., 90 F. Supp.2d 714, 716 (E.D. Va. 2000) . First, the plaintiff must show that Virginia's long-arm statute reaches the defendant. Second, the plaintiff must show that the requested exercise of

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Although plaintiff claims to have been domiciled in Virginia during the pendency of his business relationship with defendant, he established a residence in Barranquilla, Columbia, in or around 1988, and obtained a Columbian resident visa in 1993. (Compl. ¶ 22; Pl.'s Br. in Supp. of His Mot. for Leave to Conduct Nonparty Deps. at 5.)

personal jurisdiction is consistent with the due process clause. See Heathmount A.E. Corp. v. Technodome.com, 106 F. Supp.2d 860, 864 (E.D. Va. 2000); America Online, Trio. v. Huang, 106 F. Supp.2d 848, 853 (E.D. Va. 2000); Rannoch, Inc. v. Rannoch Corp., 52 F. Supp.2d 681, 684 (E.D. Va. 1999).

Even assuming they have been accurately depicted by plaintiff, defendant's contacts with Virginia do not satisfy either prong of the personal jurisdiction inquiry. First, defendant's contacts do not satisfy any of the grounds for personal jurisdiction enunciated in Virginia's long-arm statute. See Va. Code § 8.01-328.1 (Michie 2000). Second, the Court's exertion of personal jurisdiction over the defendant would offend the "traditional notions of fair play and substantial justice," thereby violating the due process clause. International Shoe Co.v. Washington, 326 U.S. 310, 316 (1945). This is because the defendant did not reach into Virginia and purposefully avail himself of the laws of this jurisdiction. See id. at 319. Rather, plaintiff appears to have reached into Columbia for defendant to secure his services and perform work with him in Columbian courts. Therefore, plaintiff has not shown by a preponderance of the evidence that the Court has personal jurisdiction over the defendant.

IV. RECOMMENDATION

The undersigned Magistrate Judge therefore recommends that plaintiff's case be dismissed without prejudice on the ground that the Court does not have personal jurisdiction over the sole remaining defendant, Danilo Devis Pereira.[3]

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[3] The undersigned Judge will hold plaintiff's Motion for Stay of Default Proceeding and Motion for Leave to Conduct Nonparty Depositions under consideration until the Court acts on this Report and Recommendation.

V. NOTICE

The parties are advised that exceptions to this Report and Recommendation, pursuant to 28 U.S.C. § 636 and Rule 72(b) of the Federal Rules of Civil Procedure, must be filed within ten (10) days of its service. A failure to object to this Report and Recommendation waives appellate review of any judgment based on it.

The Clerk of the Court is directed to send a copy of this Report and Recommendation to all counsel of record, and to the defendant at the following address:

Danilo Devis Pereira
Abogado
Carrera 51 No 79-34
Oficina 403
Barranquilla, Colombia

/S/
THERESA CARROLL BUCHANAN
UNITED STATES MAGISTRATE JUDGE

April 25, 2001
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ISIDORO RODRIGUEZ	)	
	)	
Plaintiff,	)	Civil No 00-1523-A
	)	
vs.	)	December 20, 2000
	)	
JACK HARBESTON , ET AL.,	)	
	)	
Defendants.	)	

HEARING ON MOTION

Before: James C. Cachceris, Judge

APPEARANCES:
Isidoro Rodriguez, Pro se
R. Harrison Pledger, Jr. Counsel for Defendants
COURT REPORTER: Norman B. Linnell OCR-USDC/EDVA

THE COURT: Good morning.
MR. RODRIGUEZ: Good morning, Your Honor.
THE CLERK: Civil action 00-1523-A, Isodoro Rodriguez verses Jack Harbeson. Are counsel ready to proceed?
THE COURT: Good Mr. Pledger.
MR. PLEDGER: Good morning, Your Honor. I am Harrison Pledger, for the record. And I believe this comes on this morning on my motions.
THE COURT: Okay. You represent IOTA Partners, Sea Search, armada Company—
MR. PLEDGER: Armada Company.
THE COURT: and the –

MR. PLEDGER: And Jack Harbeston.
THE COURT: Harbeston, yeah. The only one you don't represent, I think, is probably Mr. Devis, is that correct?
MR. PLEDGER: That is correct, sir.
THE COURT: Okay. All right. Go ahead, sir.
MR. PLEDGER: I have filed motions in this case on behalf of those four defendants to dismiss this action on the basis of a lack of jurisdiction in this court.

The underlying issue is a contract that was entered into by Sea Search Armada—
THE COURT: That was in Idaho, is that right?
MR. PLEDGER: Well, the contract was entered into between Colombia and Idaho, although I believe there was an acknowledgement that took place in the District f Columbia in the Colombian Embassy there. But the contract was with the Devis and Rodriguez law firm, which was a law firm in Colombia. And it was entered into in 1988. It called for an hourly fee arrangement. Subsequently was modified in 1989 to a contingency fee agreement.

The issue that is before this Court is whether the fact that an attorney is admitted to the Bar of a certain state, does that give the courts of that state jurisdiction over clients of that law firm based solely on the fact that that attorney has been admitted to the Bar in that state. There are not other contacts.

And as you read—
THE COURT: Okay. I think what he argues is they definitely wanted, your clients wanted a member of the Virginia Bar, I think that is what he said.
MR. PLEDGER: Well, I think if you look at his complaint, it doesn't square with that kind of concept because what he states in I believe paragraph—
THE COURT: I think in his opposition he is a little bit more forceful with that.
MR. PLEDGER: Well, in the complaint what he states is that

there was a call from the United States Embassy in Bogota discussing the possibility of representing the Sea Search Armada, and that's in paragraph 13.

He goes on to state that they were seeking, in paragraph 15, that the U.S. Commercial Counsel stressed that defendant Sea Search Armada were only interested in discussing representation with an active licensed attorney form the United States because Colombia does not have a Bar association with an Ethics Committee oversight.

THE COURT: But he also wrote to the Ethics Committee, I think, did he not, about the contingency fee arrangement?

MR. PLEDGER: He did indeed. Apparently when there came some conflict over fees and there was an issue as to whether he could withdraw and how they might withdraw, then he wrote Virginia and asked them for an ethics opinion as to how he might withdraw in this dispute over fee arrangement. As I say, that goes way back. And you wind up with a contingent fee agreement. The contingent fee would be based upon some kind of recovery by Sea Search Armada. There has been no recovery by Sea Search Armada.

So. If you ever get into the merits of the case, it would appear to be a case that has no merit because there has been no recovery so there may not—

THE COURT: This is basically a salvage case, is that correct?

MR. PLEDGER: It is a salvage case, apparently dealing with a sunken Spanish galleon off the coast of Colombia.

THE COURT: It is worth – and the treasure is worth somewhere in tow to ten billion, something of that nature, that is what is alleged here.

MR. PLEDGER: That is what is alleged. I have no idea because, as far as I know, nobody has ever recovered anything and the battle with the Colombian government continues to today.

But there are several issues, as I see it, raised by this. One, he has sued the Armada Company, and they are not a part of the contract that was entered into. That was simply

Sea Search Armada.

He has sued IOTA Partners, and they are not part of the contract.

And he has sued Jack Harbeston, apparently in an individual capacity. And the only connection Mr. Harbeston had was that he acted as the executive officer of Sea Search Armada in executing the contract for legal services.

But I don't believe the mere fact that –even if, even if we accept for purposes of an argument that they wanted a Virginia attorney, I don't believe the fact that that was part of the sole reason for hiring Mr. Rodriguez—

THE COURT: Okay, I understand your argument. Okay.

MR. PLEDGER: all right sir. If you have any questions, I will be happy to answer them.

THE COURT: All right. Okay. Mr. Rodriguez, I will hear you response, sir.

MR. RODRIGUEZ: Good morning, Your Honor. Isodoro Rodriguez.

THE COURT: Good morning.

MR. RODRIGUEZ: The issues seem to be somewhat obfuscated. To clarify, IOTA Partners, Sea Search Armada, Armada Company, and Jack Harbeston, who is the managing director and executive officer of all three entities, have one sole asset, and that is the treasure ship targets off the coast of the coast of the Republic of Colombia.

When these were discovered between 1980 and '82 by another partners of this conglomerate of companies, they were declared the finders of these various targets. And form 1982 until 1986 they attempted to negotiate the recovery per the contract they had envisioned with the Republic of Colombia.

And what the Republic of Colombia did in 1986 was to pass an act to retroactively change the finder's fee from 50/50 to a 95/5, and was in the process of negotiating with the government of Sweden under the former president of Republic Barco's administration for the recovery of this ship

and giving 5 percent to the U.S. citizens.

I had been the general counsel for an Exxon coal mine project and was in transition—

THE COURT: Okay. What I am interested in is any connection Virginia that you have.

MR. RODRIGUEZ: The connection--. I was approached both by Mr. Harbeston and the U.S. Embassy because I, number one, was an experienced international lawyer particularly with Colombia.

Number two, I was a Virginia attorney and U.S. citizen. And the reason—

THE COURT: You were practicing in Barranquilla, Colombia.

MR. RODRIGUEZ: No, I didn't have a practice-- In fact, my practice, I was developing a practice, international practice out of Alexandria, Virginia.

THE COURT: Okay.

MR. RODRIGUEZ: My office has been in Alexandria since 1979. and I only shut it done {sic} in 1993 when I obtained residency to live in Colombia. Up until then, I was on a businessman's visa commuting back and forth.

THE COURT: Okay. Are you a Colombian citizen or—

MR. RODRIGUEZ: No, I am a U.S. citizen.

THE COURT: U.S. citizen, Virginia resident?

MR. RODRIGUEZ: A Virginia resident, U.S. citizen. I have been a member of the Virginia Bar. And the reason why this was all very pivotal, just like other American companies seeking American counsel is because once you have an American counsel in Colombia who is designated as the legal representative, they are in turn given all the powers of the board of directors. In other words, all the powers that Sea Search Armada had with regard to, and it is part of the exhibits in the complaint, with regard to those treasure ship targets, I or any legal representative would have the right to relinquish.

And so, therefore, they needed the fiduciary and

fidelity of an American lawyer which they could control. And that was always understood.

THE COURT: It wouldn't have made any difference had you been a member of the New York Bar, D.C. Bar or what ever. Okay.

MR.RODRIGUEZ: Nebraska Bar, whatever. It is normal in large international projects-- In fact, between 1980, after I left the White House administration, between 1982 to 1983 Morrison Knutson, who was a prime contractor of the Exxon project, had five times attempted to met me a visa to work down in Colombia because they needed to have an American counsel because they needed to have that type of security, which then had oversight over the Colombian lawyers.

And that is why there was a nexus and that's why I accepted the contract and at that time formed an association with the Colombian lawyer, who I though who had fidelity, or simper fi as we say in the Marine Corps, because I saved his life.

THE COURT: Is that Mr. Devis?

MR. RODRIGUEZ: Mr. Devis.

THE COURT: Yeah, D-e-v-I-s for the record. Okay go ahead—

MR. RODRIGUEZ: I am sorry, Mr. Danilo Devis for the record.

And so, I associated with Mr. Devis for this specific joint venture to deal with the litigation against the Republic of Colombia. Which, as a U.S. citizen, placed me in a very unique and dangerous situation. And which was one of the reasons why I sent a letter to the Virginia Bar because around that time, back in 1990, Mr. Harbeston had sent, without advising me, a very defamatory letter to the Republic of Colombia. And I was, we all were concerned because of retaliations.

And so, I sent the letter to the Virginia Bar because they wanted the fiduciary relationship. And if I renounced

my position as legal representative, the entire lawsuit would have been dissolved because they would not have had jurisdiction to maintain the lawsuit. That was the first issued that had to be resolved by the Court in 1994 decision. Whether or not there was jurisdiction of this foreign company, Sea Search Armada, IOTA Partners, the Armada Company, to have that lawsuit. And the reason—

THE COURT: And you agree, none of those, including Harbeston, are Virginia residents or companies? Do you agree—

MR. RODRIGUEZ: The Armada Company and Sea Search Armada are Cayman Island companies. IOTA Partners is a limited partnership out of Idaho. Mr. Harbeston's managing company that runs IOTA Partners is out of the state of Washington.

THE COURT: Okay. What is your theory under the Long Arm Statute then? Is it making a contract to provide services causing tortuous injury? What is you theory there?

MR. RODRIGUEZ: There are two theories. There is a contract that provided—not only provided services, but maintained a fiduciary relationship to maintain this lawsuit until –

THE COURT: Okay. The contract was signed either in Colombia or Idaho, right?

MR. RODRIGUEZ: It was signed actually, there was initial contract that was signed by Mr. Harbeston which was later incorporated by the board of directors of Armada Company in the Cayman Islands, which in turn was notarized and officiated in Washington, D.C. and sent down, a s well as the power of attorneys that were given to me. Because there were two things, there was the power of attorney and the contract, because the contract was-- I mean, there are a lot of Isidoro--- There are not that many Isidoro Rodriguezes, but there are a lot of Rodriguezes in Colombia that they could have hired. But they needed to have an American lawyer who resided there.

THE COURT: I know what you mean.
MR. RODRIGUEZ: And so, that duty that I had to maintain the integrity of Sea Search Armada, which was the only essence---Because if you look at the IOTS memorandum, which is part of my documents showing the interrelationships of all of these entities, that was the only item of value was the treasure targets. There were eight targets.

The reason why we say eight is because back in 1980-82' there was not the sophisticated way, except for in the navel sphere, for treasure ships to be specified specifically where the target vis-à-vis surface locations, satellite locations 700 meters or 700 feet below the surface. So, there was the seven targets that we were looking at.

Now, the problem generated was that after 1994, winning the first case that confirmed jurisdiction and the appeals case in 1997, then when President Pastrana became the president of Colombia in 1998, they began negotiations. And in 1998, that's when this partnership and my law partner or this group of companies cut off communications with me.

And when I requested between 1998 to 199, because at the time I was also being subject by the guerrillas for kidnspping, and it was a very precarious situation for me, I noted—
THE COURT: I have read you pleadings.
MR. RODRIGUEZ: So, the issue-- I did not want to leave Colombia and then loose the value of the assets or the contract and the value of the litigation for my client. And that's why finally I had to file this lawsuit, to get and opinion as to, number one, the current status of my contract because it is doubtful Mr. Harbeston—
THE COURT: All right, I understand your argument.
MR. RODRIGUEZ: Thank you, Your Honor.
THE COURT: Okay. This matter is before the Court on defendants' motions to dismiss for lack of personal

jurisdiction. It's all the defendants, basically, except Mr. Devis.

The defendants in this matter were engaged in deep-sea exploration aimed at locating and salvaging the wreck of the galleon San Jose, which sunk off the coast of the Republic of Colombia in 1707. The ship is believed to carry at least two billion in treasure and possibly much more.

The plaintiff, Mr. Rodriguez, is a U.S. citizen, a member of the Virginia State Bar, and was contracted while he was in Colombia and retained with his law partner, Danilo Devis Pereira, P-e-r-e-I-r-a, to perform certain legal tasks in Colombia on behalf of the other defendants, including filing suit in Colombia court against the Colombian government. The plaintiff alleges he was not fully paid for his services.

The defendants filing motions to dismiss are Sea Search
Armada, (SSA), a limited partnership organized under the laws of the Caymand Islands, which holds title to the San Jose; Armada Company, also organized under the laws of he Cayman Island and the managing general partner of SSA; IOTA Partners, an Idaho limited partnership selling investment shares in SSA's interests in the San Jose; and Jack Harbeston, H-A-R-B-E-S-T-O-N, a resident of the state of Washington, who is managing director of SSA, president of Armada and general partner of IOTA Partners.

A 12(b)(2) motion to dismiss states the Court lacks sufficient jurisdiction over the defendant's person to exercise judicial power over him. Where a nonresident over whom jurisdiction is asserted has established certain minimum contacts with a forum, such that requiring him to defend interests in the forum would not offend traditional notions of fair play and substantial justice, and where such person has purposely availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of state laws, jurisdiction will be upheld. See

Peanut Corporation of America versus Hollywood Brands Inc., 696 F.2d 311, 314, Fourth Circuit, 1982 case.

The Court makes a two fold inquire into the validity of an assertion of in personam jurisdiction over nonresident defendant. Jurisdiction is proper only if, one, a statue statute provides authority for the assertion of jurisdiction and two, the assertion of jurisdiction under the particular facts does not offend the due process clause of the Fourteenth Amendment to the United States Constitution. August v. HBA Life Insurance Company, 734 F.2d 168, 170 Fourth Circuit, 1984.

Virginia has described its Long Arm Statute, Virginia code 8.91-328.1, as asserting in personam jurisdiction to the full extent permitted by due process. Danville Plywood Corp. v. Plain & Fancy Kitchen, Inc., 218 Virginia 533, 238 S.E.2d 800, 802, 1977 case.

And then the Long Arm Statute provided a number of situation such as personal jurisdiction over a person who acts directly by an agent so to cause –to a cause of action arising form the person transacting any business in the Commonwealth; tow contracting to supply services or things in the Commonwealth; three causing tortuous injury by an act or omission in this Commonwealth; four, causing tortuous injury in this Commonwealth by an act or omission outside the Commonwealth if he regularly does or solicits business, or engages in any other substantial course of conduct, or derives substantial revenue form good used or consumed or services rendered in this Commonwealth.

When jurisdiction over a person is based solely upon this section, only a cause of action arising form acts enumerated in this section may be asserted against him. That is Code Section 8.01-328.1 (2000).

The burden is on the plaintiff to show by a preponderance of the evidence that the defendants' acts placed them within the reach of the Long Arm Statute. Marshall Exports, Inc, v. Phillips , 507 F.2d 47, page 49

Fourth Circuit, 1974.

Mr. Rodriguez alleges that defendant Harbeston, acting on behalf of defendant Armada, later ratified his original agreement with SSA. However, none of these contracting actions took place in Virginia.

Mr. Rodriguez does not allege that any defendant regularly transacted business in Virginia or contract to supply things or services in Virginia.

The plaintiff Rodriguez contends the defendants chose him to conduct their affairs in Colombia precisely because he is a member of the Virginia Bar. The complaint is inconsistent on this point.

Defendant SSA had apparently had a prior negative experience with a Colombian attorney, so it sought to retain a member of a U.S. state Bar with the attendant ethics requirements.

Mr. Rodriguez' complaint observes that the Commercial Counsel for the United States Embassy in Bogota, Colombia contacted him after learning of defendant SSA was interested in securing the services of, quote, an active licensed attorney from the United States, unquote, not specifically from Virginia.

Mr. Rodriguez further alleges that the U.S. Commercial Counsel's recommendation of him to defendant SSA partly is because he was a member of the Virginia State Bar. But this obviously does not mean defendant had such a specific requirement.

Moreover, even if defendant choose to retain Mr. Rodriguez because of his Virginia State Bar affiliation, this alone is not sufficient connection to Virginia to establish this Court's personal jurisdiction over defendants under the Long Arm Statute.

As noted above, the defendants did not transact any business in the Commonwealth, nor did they contact to supply services or things in Virginia, nor do they regularly transact business in Virginia.

Mr. Rodriguez was contacted by defendant Harbeston while Mr. Rodriguez was in Colombia, where he has an office, not in Virginia. Any litigation work to be performed by Mr. Rodriguez related to the Republic of Colombia, not the Commonwealth of Virginia.

Further, the defendant have not caused tortuous injury by any act or omission in Virginia because their contacts with Mr. Rodriguez have all occurred outside of Virginia, either in the Republic of Colombia, Idaho, Seattle, Miami, or Washington, D.C.

There is no nexus to the Eastern District of Virginia beyond the bare allegations that the defendants selected Mr. Rodriguez because of his Virginia State Bar membership. This is not sufficient under the Long Arm Statute

Again, the plaintiff bears the burden or defeating a motion under Rule 12(b)(2). Mr. Rodriguez has not shown by a preponderance of the evidence that the defendants selected him to represent them in Colombia because he was a member of the Virginia State Bar as opposed to some other official Untied States Bar association.

And even if Mr. Rodriguez had established that connection, it would be too tenuous a link to Virginia to allow this court to exercise authority over the defendants with the limits of the due process clause.

For the foregoing reasons, defendants ' motions are granted.

And also in light of the court's ruling, the defendant's motion for sanctions is denied as moot. So, you won't have to come back tomorrow.

Okay. Thank you very much.

HEARING CONCLUDED

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

/S/

Norman B. Linnell, CP, CM, CE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ISIDORO RODRIGUEZ, ESQ.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No CA-001523-A
	)	
JACK HARBESTON, ET AL.	)	
	)	
Defendants.	)	

ORDER

For the reasons stated in open Court, it is hereby ORDERED that:

1. The Motions to Dismiss of Defendants Jack Harbeston, Sea Search Armada, Armada Company, and Iota Partners are GRANTED without prejudice;

2. Plaintiff's Motion for Sanctions under Rule 11 is DENIED as moot;

3. the action against Defendant Danilo Devis Pereira remains; and

4. the Clerk shall forward copies of this Order to all parties and counsel of record.

December 21st, 2000
Alexandria, Virginia

/S/
Judge J. Cachceris

[SEAL]

50 Years Public Service
Virginia State Bar
1938-1988

VIRGINIA STATE BAR
Tenth Floor, Ross Building, 301 East Main Street
Richmond, Virginia 2319 (804)786-2061

(804)736-5966 (Voice/TDD)

STANDING COMMITTEE ON LEGAL ETHICS

February 27; 1990
PERSONAL AND CONFIDENTIAL

Isidoro Rodriguez C., Esquire
Calle 84 No. 56-51
Piso 2, Oficina 4
Barranquilla, Colombia S.A.

Re: Legal Ethics Opinion # 1325

Dear Mr. Rodriguez:

I am writing in response to your letter dated January 3, 1990, requesting an informal advisory opinion from the Virginia State Bar Standing Committee on Legal ethics ("committee").

You have advised that, although you are a member of the Virginia State Bar, you reside and practice in a South American country. You further indicate that you entered into an agreement, which was executed in Idaho, to represent a foreign corporation in the negotiation, settlement, and/or litigation against a foreign government resulting from the corporation's claim as finder of a shipwreck which contained an estimated $3

billion in treasure. The agreement provided for an hourly fee rate, costs, and monthly detailed invoices and was affirmed by the corporation's Board of Directors which also named you as Legal Representative for the corporation. You have described for the committee that a Legal Representative In the country in which you practice is distinct from an attorney at law and is the commercial. representative for the company in that country with all of the corporate powers of the Board of Directors and all, of the potential individual liability. Furthermore, such a Legal Representative is not required to be an attorney at law. Subsequent to those corporate actions, you were authorized to bring a legal action against the foreign government and you authorized your then-law partner, which partnership has subsequently been dissolved, to file the suit as Attorney of Record. The facts you have provided indicate that the suit was filed shortly after you authorized your partner to do so.

You indicate that, although much time has been expended on the case and the corporation repeatedly expressed satisfaction with the work being performed by your firm, the corporation has failed to comply with its contractual agreement to pay invoices after they were presented. Specifically, the corporation agreed to pay $10,000 approximately two months after suit was filed and an additional $50,000 within 30 days thereafter. The first payment ($l0,000) was made as scheduled, but no further payments have been made by the corporation. Subsequent to that first payment, the corporation requested a contingent fee agreement be submitted for consideration; such a contract was prepared and submitted, but the corporation has not responded.

In addition to the failure to pay fees, you indicate that the corporation, without your knowledge, sent a defamatory

letter against the foreign government which then prepared an official protest to the United States Embassy. You indicate that the letter accused the government and unnamed officials of criminal acts, subjecting you, as the corporation's Legal Representative, to civil liability and both you and your former law partner to physical danger.

As a result of both issues, failure to pay fees and costs owed and the defamatory latter, you requested that the corporation retain a new Legal representative and a new attorney. You indicate that to date you have not received any response from the corporation's Board of Directors.

Finally, you advise that under the law and professional norms of the foreign government, your former 1ev partner has a right to unilaterally and voluntarily withdraw from the litigation, without any requirement to seek permission of the trial court. You indicate that he may also file a civil suit against the corporation for monies owed during or after litigation. Your former partner has not exercised those rights pending your receipt of this informal advisory opinion.

You have asked that the committee opine as to the propriety of your renunciation of your fiduciary appointment as Legal Representative to the corporation in view of the non-payment of costs and fees owed and of the defamatory letter sent by the corporation to the foreign government. You have further inquired as to the propriety of your instituting suit against the corporation for their non-payment of fees and costs owed.

The appropriate and controlling rules relative to your questions are DR l-102(A)(4) which prohibits a lawyer from engaging "in conduct involving dishonesty, fraud,

deceit, or misrepresentation which reflects adversely on [the] lawyer's fitness to practice law"; DR 2-l08(B)(2, 3, and 4) which proscribe the conditions which permit a lawyer to withdraw from representing a client; DR 2—108©) which directs that counsel of record in a court proceeding may not withdraw except by leave of court after notice to the client of the time
and place of a motion for leave to withdraw; and DR1-102(B) which instructs that a lawyer admitted to practice in Virginia is subject to the Virginia Code of Professional Responsibility although engaged In practice elsewhere, unless disciplinary rules of the foreign jurisdiction permit the activity [emphasis added].

The committee is of the opinion that the provisions of DR l-l02(A)4) embrace far more than an attorney's conduct in the context of an attorney/client relationship. Thus, the committee opines that when an attorney assumes the responsibility of acting as a fiduciary and violates his or her duty in a manner that would justify disciplinary action had the relationship been that of attorney/client, the attorney may be properly disciplined pursuant to the Code of Professional Responsibility. The committee thus specifically adopts the conclusions reached in ABA Formal Opinion 336. See also: State. v Freeman, 229 Kan. 639, 629 P.2d 716 (1981); and Committee on Professional Ethics v. Gross, 322 N.V2d 82 (Iowa 1982).

Virginia Disciplinary Rule 2-108(B), subsections (2), (3), and (4), directs that a lawyer may withdraw from representing a client if (2) the client persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is illegal or unjust; (3) the client fails to fulfill an obligation to the lawyer regarding the lawyer's services and such failure continues after reasonable notice to the client; or (4) the representation

will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client. The committee is of the opinion that, under the facts you have provided, it would n6t be improper to move to withdraw as Legal Representative for the corporation. See also LEO #974. The committee understands, however, from your recitation of the facts, that such permission of the court is not required in the foreign country in which you practice. Under those circumstances, the committee directs your attention to DR 1-102(B) which, as noted above, would control. Therefore, if the professional norms in that country permit unilateral and voluntary withdrawal from representation without authorization by the court, it would not be improper for you to act accordingly.

The committee has earlier opined that there is no disciplinary rule ethically prohibiting an attorney from bringing an action against his client for past-due attorney's fees end costs. See LEOs #974 and 995. Guidance I available under Ethical Consideration 2-25 which urges that a lawyer should not sue a [current] client for a fee unless necessary to prevent fraud or gross imposition by the client. See LEO 11117. But see LEOs #1230 and 1257.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Very truly yours,
Kathleen O'Brien

Encl.
cc: C. Torrence Armstrong, Esquire
Willard M. Robinson, Jr., Esquire
Susan B. Spielberg, Esquire

U.S. AND VIRGINIA CONSTITUTION, FEDERAL STATUTES AND VIRGINIA STATUTORY PROVISIONS INVOLVED

CONSTITUTION, AMENDMENT V.
The Fifth Amendment to the Constitution of the United States, provides in pertinent part, that no person shall "be deprived of . . . property, without due process of law."

U.S. CONSTITUTION, AMENDMENT VII.
The Seventh Amendment to the Constitution of the United States provides that "[i]n suits at common law, . . . , the right of trial by jury shall be preserved . . . ."

CONSTITUTION OF VIRGINIA, SECTION 11. DUE PROCESS OF LAW; OBLIGATION OF CONTRACTS; . . . ; JURY TRIAL IN CIVIL CASES.
That no person shall be deprived of his . . . property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, . .
That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred . . . .

FULL FAITH AND CREDIT FEDERAL STATUTE
28 U.S.C.A. § 1738 (West 2000), provides in pertinent part, that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

RULES ENABLING ACT
28 U.S.C. § 2072–Rules of procedure and evidence; power to prescribe
(a) The Supreme Court shall have the power to prescribe

general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and the courts of appeal.
(b) Such rules shall not abridge, enlarge, or modify any substantive right. . . .

Virginia Code § 54.1-3932. Lien for fees.
Any person having or claiming a right of action sounding in . . . contract, may contract with any attorney to prosecute the same, and the attorney shall have a lien upon the cause of action as security for his fees for any services rendered in relation to the cause of action or claim. . . .

Title 18.2 Crimes and Offenses Generally , Chap. 12 Miscellaneous, §§ 493 - 510, Art. 2 Conspiracy to Injure Another in Trade, Business or Profession, §§ 499 - 501

Virginia Code § 18.2-499. Combination to injure others in their reputation, trade, business or profession: right of employees
(a) Any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever, or for the purpose of wilfully and maliciously compelling another to do or perform any act against his will, or preventing or hindering another form doing or performing any lawful act, shall be jointly and severally guilty of a Class 3 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under § 18.2-500.

(b) Any person who attempts to procure the participation, cooperation, agreement or other assistance of any one or more persons to enter into any

, mutual
understanding or concert prohibited in subsection (a) of this section shall be guilty of a violation of this section and subject to the same penalties set out in subsection (a) hereof.

Virginia Code § 18.2-500. Same; civil relief; damages and counsel fees; injunctions. —
(a) Any person who shall be injured in his reputation, trade, business or profession by reason of a violation of § 18.2-499, may sue therefor and recover three-fold the damages by him sustained, and the costs of suit, including a reasonable fee to plaintiff's counsel; and without limiting the generality of the term, "damages" shall include loss of profits. Such counsel shall in no case receive any other, further or additional compensation except that allowed by the court and any contract to the contrary shall be null and void.

Virginia Code § 8.01-328.1.
When personal jurisdiction over person may be exercised.
A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:
1. Transacting any business in this Commonwealth;...;
4. Causing tortuous injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly . . .engages in any other persistent course of conduct, or derives substantial revenue from . . . services rendered, in this Commonwealth;. . .